STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Citizens Utility Board, Citizen Action/	**:**	
Illinois and AARP	**:**	
-vs-	**:**	
Illinois Energy Savings Corp.,	**:**	**08-0175**
d/b/a U.S. Energy Savings Corp.	**:**	
	:	
Complaint as to marketing practices	**:**	
in Chicago, Illinois	**:**	

PROPOSED ORDER

January 11, 2010

Table of Contents

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Citizens Utility Board, Citizen Action/ Illinois and AARP	:	
-vs-	:	
Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp.	:	**08-0175**
	:	
Complaint as to marketing practices in Chicago, Illinois	:	

PROPOSED ORDER

By the Commission:

I. INTRODUCTION AND PROCEDURAL HISTORY

On March 3, 2008, the Citizens Utility Board ("CUB"), the AARP and Citizen Action/Illinois ("Action") (collectively, "Consumer Groups" or "Complainants" or "CG")[1] filed a verified Complaint against Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp. ("USESC" or "Respondent" or the "company")[2], alleging violations of the Alternative Gas Supplier Law ("AGSL")[3], Section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA")[4], the Illinois Deceptive Trade Practices Act ("DTPA")[5], the common law prohibition against unreasonable liquidated damages, and the supplier Standards of Conduct contained in tariffs filed with this Commission by the Peoples Gas Light and Coke Company and its affiliate, North Shore Gas Company (together, "Peoples Gas"), and Northern Illinois Gas Company ("Nicor"). According to the Complaint, Respondent's purported violations are associated with door-to-door customer solicitation by USESC sales agents and the fees imposed on customers seeking to terminate contracts resulting from such solicitation.

For relief, the Complaint requests an Order: 1) requiring USESC to cease and desist or correct its alleged violations of the AGSL; 2) imposing financial penalties on USESC for its alleged violations of the AGSL; and 3) altering, modifying, suspending or

[1] "Consumer Groups" are designated as "CG" in citations within this Order.
[2] After doing business in Illinois from January 2004 to May 2009 as U.S. Energy Savings Corp., Respondent Company changed its name in May 2009 to Just Energy Illinois Corp., and now does business as "Just Energy." Tr. 709 (Potter).
[3] The Alternative Gas Supplier Law is Article XIX of the Illinois Public Utilities Act ("Act") and thus appears at 220 ILCS 5/19-100 *et seq*.
[4] 815 ILCS 505/2.
[5] 815 ILCS 510/1 *et seq*.

revoking USESC's certificate of authority to operate as an Illinois alternative gas supplier ("AGS").

On April 24, 2008, USESC filed its Answer to the Complaint, denying its material allegations, opposing its requests for relief and raising certain affirmative defenses. On the same date, Respondent also filed a Motion to Dismiss the Claims in Sections V, VI and VII of the Complaint. Complainants and Commission Staff each filed a Response to that motion on May 9, 2008, and USESC filed a Reply to those responses on May 19, 2009. On June 9, 2008, the Administrative Law Judge ("ALJ") in this proceeding filed a Ruling denying the Motion (except with regard to a single sentence in Count VII of the Complaint).

On September 18, 2008, USESC filed a Motion to Dismiss [Action] and AARP for Lack of Standing. Action and AARP filed a Reply to the motion on September 30, 2008 and USESC filed a Reply to the Response on October 7, 2008. The ALJ issued a Ruling on the motion on November 17, 2009, dismissing Action and AARP from this docket, but granting each of those Complainants leave to amend the Complaint in a manner described in the Ruling.

On December 3, 2008, CUB and AARP filed a First Amended Complaint. Action did not join in that Amended Complaint (and therefore ceased to be regarded by the ALJ or any party as a "Complainant" or part of the "Consumer Groups" in this docket after December 3, 2008)[6].

On December 17, 2008, Respondent filed its Answer to the Amended Complaint[7]. Respondent denied the material allegations of the Amended Complaint, opposed its requests for relief and raised certain affirmative defenses.

On February 24, 2009, the Complainants and Respondent filed a joint Motion for Continuance of this proceeding. The parties stated that they were engaged in settlement discussions that could lead to a voluntary resolution of the disputed issues in the case. The motion was granted by an ALJ's Ruling filed on February 26, 2009. The parties filed a similar joint motion on April 6, 2009, which was revised on April 9, 2009. The revised motion was granted by an ALJ's ruling filed on April 10, 2009. On July 1, 2009, Staff filed an Agreed Motion for Extension of Time that again asserted that the parties were conducting settlement negotiations. By an ALJ's Ruling filed on July 6, 2009, that motion was granted.

On September 22, 2009, USESC filed a Motion to Strike or bar admission of written testimony pre-filed by the Consumer Groups' witness (Barbara Alexander). CUB filed a response to that motion on October 6, 2009, and USESC filed a Reply to that

[6] For convenience, the First Amended Complaint will be referred to as "the Complaint" throughout this Order.
[7] For convenience, the Answer to the First Amended Complaint will be referred to as "the Answer" throughout this Order.

response on October 9, 2009. The motion was denied, with two minor exceptions, by an ALJ's oral ruling during a hearing conducted on October 13, 2009.

Pursuant to proper legal notice, the ALJ conducted hearings at the Commission's offices in Chicago, Illinois on April 2, May 21 and November 5, 2008, and on October 13, October 14-16 and November 5, 2009. All parties appeared through legal counsel at each of the foregoing hearings.

At the evidentiary hearings conducted in this docket, on October 14-16, 2009, each party presented its direct case. CUB presented the testimony of Lucy Jodlowska (Ex. 1.0), Aimee Gendusa-English (adopting testimony pre-filed by Sandra Marcelin) (CUB Ex's. 2.0, 5.0 & 9.0), Catherine Vargas (CUB Ex's. 3.0 & 6.0), Alex Zermeno (CUB Ex's 4.0 & 7.0) and Bryan McDaniel (CUB Ex. 8.0). The Consumer Groups presented the testimony of Barbara Alexander (CG Ex's 1.0, 2.0 & 3.0)[8]. USESC presented the testimony of Gord Potter (USESC Ex. 1.0 & 5.0), Frances Findley (USESC Ex. 2.0), William Nicholson (USESC Ex. 3.0) and Steven Hames (USESC Ex. 4.0). Staff presented the testimony of Jim Agnew (Staff Ex. 1.0 & 2.0). Each party conducted cross-examination and offered cross-examination exhibits.

CUB, USESC and Staff each filed an Initial Brief ("IB") on December 7, 2009. Those parties each filed a Reply Brief ("RB") on December 17, 2009.

On January 8, 2010, the ALJ marked the record in this docket "heard and taken."

An ALJ's Proposed Order was served on the parties on January 11, 2010.

II. ANALYSIS AND CONCLUSIONS

COMMISSION JURISDICTION

USESC is a certified Illinois AGS subject to the AGSL. The Consumer Groups rely on Section 19-120 of the Act[9] as the source of Commission jurisdiction to entertain complaints arising under the AGSL. At the time the Amended Complaint was filed (and still today), subsection 19-120(b)(1) provided that the Commission "shall have jurisdiction in accordance with the provisions of Article X of this Act to entertain and dispose of any complaint against any [AGS] alleging that: the [AGS] has violated or is in nonconformance with any applicable provisions of Section 19-110 or Section 19-115" of the Act. The Commission thus has jurisdiction over Count IV of the Amended Complaint, which concerns alleged violations of the AGSL.

---

[8] Ms. Alexander was the only witness sponsored jointly by the Consumer Groups (that is, by both CUB and AARP). The other witnesses testifying on behalf of the joint Complainants are sponsored solely by CUB. The reasons for this are unexplained but witness sponsorship has no bearing on the merits of the Complaint.

[9] 220 ILCS 5/19-120.

Similarly, at the time the Amended Complaint was filed (and today), subsection 19-120(b)(3) granted the Commission jurisdiction to consider complaints asserting that an AGS "has violated or is in nonconformance with the transportation services tariff of, or any of its agreements relating to transportation services with, the gas utility…providing transportation services." Accordingly, the Commission has jurisdiction over Count VIII of the Amended Complaint, where Consumer Groups assert violation of the transportation tariffs of Nicor and Peoples Gas.

The Commission's jurisdiction over Counts V, VI and VII of the original Complaint (which remained unchanged in the Amended Complaint) was challenged by Respondent in a motion to dismiss (described above). In the June 9, 2008 Ruling denying that motion, the ALJ noted that subsection 120(b)(1) affords Commission jurisdiction over alleged violations of Sections 19-110 and 19-115[10], that subsection 19-110(e)(5) obliges a prospective AGS to demonstrate that it will "comply with all other applicable laws and rules," and that subsection 19-115(b)(2) requires a certificated AGS to "continue to comply with the requirements for certification stated in Section 19-110." Therefore, the ALJ reasoned, the critical question was whether the CFA (the subject of Count V of the Complaint), the DTPA (the subject of Count VI) and Illinois common law (the subject of Count VII) were among the "other applicable laws and rules" applicable to an AGS under Sections 19-110 and 19-115.

The ALJ answered that question affirmatively in the June 2008 Ruling, concluding that laws and rules are "applicable" within the meaning of Sections 19-110 and 19-115 when they "concern the AGS' performance as a retail gas supplier."[11] The Commission agrees and adopts the reasoning and conclusions of the June 2008 Ruling with respect to Commission jurisdiction. When we are statutorily authorized to assess an AGS' (or utility's) compliance with "applicable law," we are thus authorized to consider compliance with any law pertaining to the AGS' performance as an AGS. However, as stated in the July 2008 Ruling, when we do so, it is for the purpose of enforcing *the Act*, not the applicable law outside the Act[12]. Consequently, we are limited to imposing the penalties or other corrective measures set forth *in the Act*, not in the applicable law beyond the Act. In this instance, we are therefore limited to the remedies set forth in subsection 19-120(c). These include financial penalties, corrective orders, including cease and desist orders, and modification, revocation or suspension of an AGS' certificate. (Remedies are discussed in detail in a later section of this Order.)

In sum, the Commission has jurisdiction under Section 19-120 to entertain Counts IV through VIII of the Amended Complaint and to impose, where warranted, the penalties enumerated in subsection 19-120(c).

---

[10] 22O ILCS 5/19-110 & 19-115.
[11] ALJ's Ruling, June 9, 2008 at 10.
[12] As the Commission put it in another complaint alleging commercial misrepresentation, Citizens Utility Board v. Illinois Bell Telephone Company, Dckt. 00-0043, "while the Commission cannot use…evidence to enforce the [CFA], we can consider that evidence *for the purpose of enforcing the [Act]*." Order, Jan. 23, 2001 at 6 (emphasis added).

CONTEXTUAL FACTS

In Docket 03-0720, USESC was certified as an AGS on December 17, 2003. Its Certificate of Service Authority allows it to sell natural gas to eligible residential and small commercial customers in the service territories of Peoples Gas and Nicor. Respondent solicits customers almost exclusively through door-to-door sales, CG Ex. 1.0 at 12, fn. 4, by persons that USESC regards as independent contractors, not employees. USESC Ex. 1.0 at 8. These contractors are ranked as Regional Distributors, crew chiefs or sales contractors. Regional Distributors maintain USESC's Illinois sales offices, select sales contractors, appoint crew chiefs and perform personnel training and oversight pursuant to USESC requirements. The contractors derive their entire compensation from sales commissions and sales-based rewards.

The company's gas contracts contain a fixed price per therm of gas consumed over a four- or five-year period. There is a cancellation fee for early termination by the customer. The fees were formerly calculated be reference to estimated consumption over the remaining life of the contract. There is now a flat cancellation fee.

During the time frame relevant to this Complaint, USESC was an affiliate of U.S. Energy Savings Corp., which was in turn an affiliate of Ontario Energy Savings Corp., which is indirectly 100% owned (through Ontario Energy Commodities, Inc., and Ontario Energy Savings LP) by the Energy Savings Income Fund ("ESIF"), a trust under the laws of the Province of Ontario, Canada. CG Ex. 2.5. Affiliates of USESC offered (and continue to offer) retail gas supply in certain other states and provinces. The highest-ranking executives responsible for Respondent's performance are located in Ontario and, for convenience, will be denominated "upper management" throughout this Order.

Respondent's door-to-door sales have been the subject of consumer complaints received by CUB, the Better Business Bureau ("BBB), the Consumer Services Division ("CSD") of this Commission, the Illinois Attorney General, natural gas utilities and USESC itself. This dispute is principally about the significance of those complaints under Illinois law.

RELEVANT TIME FRAME

During the evidentiary phase of this proceeding, the parties were ambiguous about the time frame during which USESC's alleged violations of the AGSL, the CFA, the DTPA, the rule against unreasonable liquidated damages and the tariffs of certain gas utilities occurred. In response to an ALJ's request, each party identified the time period it believed to be encompassed by the Complaint. Staff and USESC identified the interval from January 2007 through March, 2008. Staff IB at 2; USESC IB at 1. Consumer Groups identified a time frame from January 2007 through December 2008. CG IB at 1.

The Commission concludes that January 2007 through March 2008 is the period during which the lawfulness of Respondent's conduct as at issue in this case. CUB filed its initial Complaint in March 2008. Although Consumer Groups filed an Amended Complaint in December 2008, their substantive allegations did not change. Moreover, because of the unique nature of many Commission proceedings, in which written testimony is filed before evidentiary hearings take place, Consumer Groups, USESC and Staff filed direct testimony in, respectively, August, September and October 2008, before the Complaint was amended. Accordingly, in our judgment, this dispute was framed by the original complaint and pertains to purported violations preceding or essentially contemporaneous with that complaint.

That does not mean that evidence concerning circumstances after March 2008 does not belong in the instant record. To the contrary, insofar as that evidence sheds light on matter during the January 2007 through March 2008 interval, it is material to this case. Moreover, to the extent that this Order finds violations by the company, post-March 2008 information is meaningful and appropriate with respect to the imposition of remedies.

VIOLATION OF THE AGSL

1. MANAGEMENT INSUFFICIENCY - SUBSECTIONS 19-110(e) & 19-115(b)

In Count IV of the Complaint, Consumer Groups allege that "USESC's continuing and fraudulent business practices violate its obligation" under subsections 19-110(e) and 19-115(b) to "maintain sufficient managerial resources and abilities to serve its customers."[13] USESC denies this allegation and has opposed it throughout the case. Staff generally supports the Consumer Groups' position and asserts that USESC has committed the purported AGSL violation.

During the times relevant to this proceeding, the pertinent part of subsection 19-110(e) provided that:

> Commission shall grant the application for a certificate of service authority if it makes the findings set forth in this subsection based on the verified application and such other information as the applicant may submit.
>
> (1) That the applicant possess [sic] sufficient technical, financial, and managerial resources and abilities to provide the service for which it seeks a certificate of service authority. In determining the level of technical, financial, and managerial resources and abilities which the applicant must demonstrate, the Commission shall consider the characteristics, including the size and financial sophistication of the customers that the applicant seeks to serve, and shall

[13] Complaint at 9, para. 26(a).

> consider whether the applicant seeks to provide gas using property, plant and equipment that it owns, controls, or operates.

By its terms, Section 19-110 governs AGS *certification*. This is not a certification proceeding; USESC was certified in 2003. However, Section 19-115 establishes perpetual obligations for certificated AGS, including the duty (in subsection 19-115(b)(2)) to "continue to comply with the requirements for certification stated in Section 19-110." Accordingly, an AGS remains subject to the Section 19-110 duties to maintain sufficient managerial resources and abilities and to comply with applicable laws and rules.

In presenting their cases, the parties have not always carefully delineated between the subsection (e)(1) management sufficiency requirement and the subsection (e)(5) legal compliance requirement. Insofar as the Consumer Groups contend that violation of the latter constitutes violation of the former, conflated treatment of the two provisions is entirely reasonable. But the two requirements are nevertheless distinct and the Commission's statutory authority is compromised when that distinction is inappropriately ignored. Management failure within the meaning of subsection (e)(1) is not always a violation of some "other" applicable law within the meaning of subsection (e)(5). For example, if an AGS incompetently manages commodity procurement and cannot deliver supply to its contracted customers, or loses customer records and cannot issue bills or provide customer service, the Commission would - and should - have authority to order corrective action under subsection (e)(1), even if the AGS' conduct did not otherwise affront the subsection (e)(5) legal compliance requirement. Thus, management insufficiency with respect to customer solicitation need not arise only from illegal conduct. Consequently, the Commission need not - and should not - solely consider violations of law when evaluating a certified AGS' continuing management performance under Section 19-115.

a.) Parties' Evidence & Arguments

Consumer Groups' evidence of management insufficiency is principally based on the volume, nature, repetition and response to customer complaints concerning the door-to-door sales efforts by USESC agents. Regarding complaint *volume*, CUB logged over 1,500 from January 1, 2007 through March 2, 2008, and a two-year total of 1,917 complaints by the end of 2008. CUB Ex. 9.0 at 3 (Gendusa-English). The combined complaints CUB received for all other AGS during those two years was 835. *Id.* The Commission's CSD recorded 1991 complaints concerning natural gas suppliers from the start of 2005 to mid-October 2008[14], of which 1336 (approximately two-thirds) were about USESC. Staff Ex. 1.0 (Agnew) at 4-5. A BBB investigator, testifying on CUB's behalf, reviewed 491 inquiries and complaints regarding Respondent from November 2005 through August 2008, CUB Ex. 1 at 6 & Tr. 900, and stated that "I have never seen this level of misrepresentation of offers and the failure of being upfront and

[14] The first two years of this time frame are not the subject of the instant Complaint.

forthcoming." *Id*. at 7. The BBB rated USESC's record "unsatisfactory…due to a pattern of complaints." CUB Ex. 1.1 at 1.

Respondent's own data base includes 2664 allegations (received from both intra-company and external sources) by Illinois customers in 2007 and 2966 in 2008, totaling 5630 over the two years[15]. CG Ex. 3.0 at 16 (Alexander). 1814 of that total (32%) concerned misrepresentation. *Id*. During the same two-year period, Complainants maintain that USESC upper management validated 1730 instances of misrepresentation-related misconduct by its sales contractors. *Id*. at 24-25.

Moreover, in the view of Consumer Groups and Staff, reported complaints merely represent a fraction of a larger number of similar but unreported occurrences. CG witness Alexander characterizes reported complaints as "the tip of the iceberg," explaining that "only a small group of customers will actually pursue their dissatisfaction or concern up the customer complaint chain." CG Ex. 1.0 at 4-5. Staff explicitly agrees with this proposition. Staff Ex. 1.0 at 8. Critically, so, too, does Respondent, who even estimates the likely - and substantial - ratio of customers *with* complaints to customers *that* complain. CG Ex. 2.0 at 8 (ratio confidential). The Commission concurs with all of the parties that a given number of similar occurrences will generate a smaller number of customer complaints.

With respect to the *nature* of the complaints directed at USESC, the principal misrepresentation purportedly made by Respondent's salespersons was that customers would realize monetary savings by selecting USESC as their gas supplier[16]. According to CG witness Alexander, based on a review of complaints received by CUB during four sample months[17], 51% of complainants identified this alleged misrepresentation. CG Ex. 1.0 at 23. Another ostensibly common complaint is that customers (19% of the complaint sample) perceive Respondent's sales agents as connected to the incumbent gas utility, a government agency or a consumer advocate[18]. *Id*. at 25. Customers also complained that USESC contractors slammed them when they made no purchase decision or even definitively rejected USESC's offer, *id*. at 29, that the sales agents misled them about the amount or timing of contract termination fees, *id*. at 32, and that they were solicited in English when they were obviously not fluent in that language. *Id*. at 35.

---

[15] Most of these are referred from other entities, including (in addition to CUB, the BBB and this Commission) the Illinois Attorney General and natural gas utilities. CG Ex. 3.0 at 15. From January through June 2008, approximately 500 of 2000 Illinois complaints were initiated with USESC or its sales verification agent. *Id*.

[16] The suggestion of financial savings constitutes a misrepresentation, Consumer Groups and Staff maintain, because USESC's usage charges are almost always higher than the competing gas utility's charges, and because USESC states that its offerings primarily provide stability, not savings. These contentions are discussed later in this Order.

[17] May, October and November 2007, and January 2008.

[18] Ms. Alexander acknowledges that customer confusion regarding the dynamics of the retail natural gas market was a likely factor in some complainants' perception of Respondent's contractors. CG Ex. 1.0 at 25. Nonetheless, she asserts that "the sales techniques used by USESC's agents have the effect of contributing to this confusion." *Id*.

Similarly, Staff summarized customer complaints handled by the Commission's CSD as follows:

> In 452 of the total 847 consumer contacts CSD received regarding USESC between January 2007 and March 2008, consumers told Staff that "savings" was emphasized at the point of sale. Likewise, CSD Staff received and recorded a large number of customer contacts (476 of the 847 USESC consumer contacts handled between January 2007 to March 2008) stating that the Early Termination Fee ("ETF") assessed by USESC was either not discussed at the point of sale or was much higher than expected. In some instances the customers reported that the ETF acted as a disincentive to the customer cancelling the contract. Moreover, CSD Staff recorded contacts from consumers stating that USESC sales agents misrepresented themselves to be employees of a utility (155 of the 847 handled January 2007-March 2008) or misrepresented themselves to be employees of a government agency (18 of the 847). As with the CUB complaints, CSD Staff recorded many consumer contacts (96 of the 847) stating that differences between the language spoken by the salesperson and that spoken by the customer led to confusion and possible deception in the sale…A large number of customers (112 of the 847) challenged the overall validity of the sale, with some of these reporting that slamming had occurred.

Staff Ex. 1.0 at 6.

The BBB described equivalent themes in the customer complaints it received during and after January 2007:

> [A] majority of our complainants alleged misleading sales practices, allegations of misrepresentation of contract length, guarantees of savings, as well as the ability to cancel the program…also…that the company's representatives misrepresented themselves and their identities. Many of the complainants were minorities, particularly Spanish speakers.

CUB Ex. 1.0 at 6.

Concerning the *repetition* of customer complaints, Consumer Groups present evidence ostensibly showing that complaints about Respondent did not diminish during the relevant time period, and may have actually increased[19]. *E.g.*, CG Ex. 1.0 at 7,

[19] The trend of complaints over time can be viewed sequentially, from one month to the next, or on a year-over comparison of the same month in succeeding years. The Consumer Groups and Staff stress

Table 1 (complaints compiled by CUB); CG Ex. 3.0 (complaints compiled by USESC); CG Ex. 3.3. Staff witness Agnew similarly testifies that "[o]ur office has received a large volume of complaints against USESC dealing with very similar consumer concerns over a sustained period of nearly four (4) years." Staff Ex. 1.0 at 8. The significance of repeated complaints, according to Staff witness Agnew, is that "when heavy volume…is paired with a repeated set of specific and similar allegations over a sustained period of time, the situation raises concerns of a systemic failure that need to be identified and addressed on a system-wide rather than an individual basis." *Id*. at 7.

USESC mounts a multi-faceted defense against the use of customer complaints as proof of management inadequacy. First, Respondent rejects the characterization of customer contacts with CUB as complaints. USESC IB at 14. Respondent emphasizes that CUB classifies all telephone contacts about a gas supplier as complaints, even when the customer is only requesting information or advice. *Id*., citing Tr. 807-09 (Gendusa-English).

Second, USESC argues that, even if it is assumed that some number of customer contacts are actually complaints, those complaints are not necessarily true or indicative of misconduct. *Id*. at 11. Respondent stresses that CG witness Alexander did not directly verify the truth or accuracy of any of the CUB complaints she reviewed. *Id*. at 11-12, citing Tr. 586. Moreover, USESC contends, "customer allegations are inherently self-serving and unreliable," citing as evidence three formal complaint proceedings in which this Commission held that customers had not sustained their complaints against Respondent[20]. Respondent avers that its own internal investigations show "wide disparities between what the consumer told CUB and what actually occurred." *Id*. at 14.

Third, USESC maintains that Complainants have failed to compare customer complaints (to the extent that customer contacts are, in fact, complaints) with the quantum of sales activity Respondent has conducted in Illinois. USESC IB at 15. As USESC calculates it, even if all complaints attributed to 2007 were indeed associated with fraud, less than 2% of company sales in that year would be implicated. *Id*. at 15-16. Along the same line, the company faults Complainants for not discussing complaint volume in relation to USESC's market share[21], *id*. at 17-18, and for not measuring Respondent's complaint-to-market-share ratio against that of other gas providers. *Id*. at 17.

Fourth, Respondent emphasizes that Complainants have not established a correlation between the date a complaint was lodged and the date of the fraudulent

---

the latter, based on the reasoning that customers pay more attention to their bills during the heating season, rather than comparing, say, August and January bills. CG Ex. 3.0 at 16; Staff 2.0 @ 15-16.

[20] Hansen v. IESC, Docket 07-0328, Order, May 21, 2008; Gingee's Sewing Alterations & Laundromat v. IESC, Docket 07-0363, Order, Jul. 30, 2008; RPM Technologies, Inc. v. IESC, Docket 08-0231 Order, Mar. 17, 2009.

[21] In order to support this point quantitatively, Respondent cites data from a CSD annual report. USESC IB at 17-18. As USESC surely knows, that report is not in the evidentiary record and cannot be used for decision-making in this case.

behavior alleged. *Id*. at 15. Therefore, USESC concludes, "it is pure guesswork for Complainants to suggest that the 'complaint' totals relate to fraudulent sales conduct occurring in 2007 and early 2008." *Id*.

Fifth, Respondent criticizes Complainants for not identifying an "acceptable complaint rate," *id*., which USESC would presumably have to exceed before its management could be considered insufficient. Building on the observation by CG witness Alexander that it would not be "realistic" to expect zero complaint for an AGS[22], Tr. 666, Respondent asserts that "[a]bsent some definition as to an acceptable complaint rate [above zero], there is simply no basis to infer ongoing fraudulent conduct from [USESC's] complaint rate." *Id*.

Sixth, USESC contends that the volume of complaints CUB received "may very well be escalated because CUB made specific efforts to increase the numbers against [USESC]." USESC IB at 19. Respondent presents several excerpts from CUB "blogs and press releases" that encourage gas customers to contact CUB with concerns about USESC[23]. *Id*.

b.) Commission Analysis

<u>The significance of customer complaints</u>.

An important threshold question posed here is whether customer complaints correlate with management sufficiency. The Commission believes that they do. A complaining customer is an unsatisfied customer. It is a fundamental management principle to reduce or eliminate complaints, in order to obtain or retain customers. Rational gas supply management regards complaints as a reflection of its competence, because complaints constrain revenue, thereby jeopardizing the viability of the enterprise.

In a competitive and unregulated market, customers who perceive themselves as aggrieved can exert pressure on one enterprise manager by purchasing service from another. In a competitive and *regulated* market, pressure can also be exerted by the regulator. Indeed, it is the regulator's duty to exert that pressure when warranted, since the State has determined that customer choice alone cannot adequately ensure management sufficiency (whether because of the nature of the service provided, the vulnerability of customers, or both). To carry out that duty, this Commission looks at the same indicators of management performance that rational and competent managers themselves look at, including the volume, nature and repetition of customer complaints.

That is what the legislature expects us to do. Subsection 19-110(e)(1) (in the pre-revision text applicable during the relevant time frame) stated that "[i]n determining the level of…managerial resources and abilities which the applicant must demonstrate,

[22] Respondent converts "not…realistic" to "impossible" in its IB at 17.
[23] Four of the excerpts are from February, March and June of 2008. One is from April 2006, well before the relevant time frame in this case.

the Commission shall consider the characteristics, including the size and financial sophistication of the customers that the applicant seeks to serve."[24] The purpose of that directive is to match the performance of the gas provider with the perceptions and expectations of the customer base. Customer complaints reflect a mismatch. Responsibility for that mismatch lies with the provider's management. It is certainly not the customer's duty to prevent the mismatch. The customer is not the certificated entity with the duty of sufficiency.

The General Assembly underscored the importance of customer complaints in 2009, when it revised the AGSL[25]. The Commission is now mandated to consider "*complaints to the Commission by consumers* regarding the [certificated AGS], including those that reflect on the [AGS'] ability to properly manage solicitation and authorization."[26] Unlike new subsection 19-110(d)(4), this revision is not limited to *formal* complaints. While this express legislative reference to customer complaints is new, the General Assembly's concern about such complaints is not[27]. Rather, the 2009 revisions arose from legislative frustration with the volume of complaints in the retail gas market[28]. "Presumably, the General Assembly was well informed and enacted the measures that are necessary to protect customers in the future." USESC RB at 47.

USESC itself recognizes, as it should, the significance of consumer complaints as a reflection of management sufficiency. Mr. Potter, the company's Executive Vice President of Legal and Regulatory Affairs, described the "underperformance" of USESC's operations through early 2008, USESC Ex. 5.0 at 15, as reflected in "an increased level of complaints," *id*. at 28, which Mr. Potter candidly attributed to "actions of sales contractors and various aspects of USESC's business processes involving customer enrollment." *Id*. Therefore, Mr. Potter stated, Respondent "implemented significant changes in February 2008 to its contract terms and conditions, enrollment processes, sales practices, and *management and compliance oversight of the sales contractors*." *Id*. at 30 (emphasis added). In Mr. Potter's view, those oversight revisions yielded "positive results…[that] "demonstrate the effectiveness of USESC's managerial resources." *Id*. at 47. By highlighting Respondent's diminished complaint volume after "comprehensive changes to USESC's business processes and *managerial oversight of its sales force*," *id*. at 49 (emphasis added), Mr. Potter confirms the Commission's view

[24] 220 ILCS 5/19-110(e)(1).
[25] To be clear, we are not suggesting that the 2009 AGSL revisions applied to Respondent during the relevant 2007-2008 time period. But the 2009 revisions illuminate the legislative intention underlying AGS regulation. USESC itself has frequently cited the 2009 revisions in its briefs here. *E.g.,* USESC RB at 22, 23, 25, 41 & 47.
[26] 220 ILCS 5/19-112 (effective April 10, 2009) (emphasis added). The AGSL revisions all took effect after surrebuttal testimony was filed in this proceeding.
[27] The General Assembly has traditionally imposed a duty on gas (and all other) utilities to promote the "comfort and convenience" of consumers through service that is "in all respects adequate, efficient, just and reasonable." 220 ILCS 5/8-101. When it opened the retail gas market to competition, the legislature did not intend that AGS managers, unlike gas utility managers, would be exempt from the duty to provide service that customers perceive as satisfactory.
[28] It can be inferred that USESC contributed to that frustration. It is the only gas supplier relying on door-to-door sales in Illinois. Tr. 739-40 (Potter). Door-to-door solicitation was mentioned expressly in the AGSL for the first time in the 2009 revisions. *E.g.*, subsection19-115(b)(4).

that complaint volume is an indicator of provider "underperformance" and management deficiency[29].

Do customer complaints indicate management insufficiency in this case?

Complainants and Staff assert that a large volume of similar complaints over a sustained period reflect management deficiency. CG Ex. 3.0 at 19-20; Staff Ex. 1.0 at 18. Looking solely at complaint volume, CUB, Staff and the BBB all say they received more complaints about Respondent than about any other supplier. That does not necessarily demonstrate management deficiency. Some provider will always receive the greatest sum of complaints, and that does not *ipso facto* reflect inadequate management. But Complainants' witnesses have shown more than that. Complaints regarding Respondent vastly exceed the claims concerning any other gas supplier and, indeed, exceed the combined complaints against all others. When a provider in a competitive market generates customer disapproval at a level far above industry norms, there is management deficiency.

Respondent, however, asserts that dramatic divergence from industry norms has not actually occurred here. It dismisses consumer complaints as "inherently self-serving and unreliable." But the Commission presumes that all participants in the commercial gas market, including suppliers, are acting in their self-interest. Competitive markets are premised on that presumption. As for unreliability we note that Respondent does not manage its own business on the assumption that complaints are "inherently" unreliable. It maintains internal units whose very purpose is to review and resolve consumer complaints. The company's Corporate and Consumer Relations ("CCR") group routinely accepts and analyzes customer complaints, including those forwarded by, among others, three entities involved here (CUB, Staff and the BBB). Tr. 376 (Findley). Indeed, when asked whether "complaints can provide a useful tool to detect violations of corporate policy, USESC witness Findley replied, "[y]es, that's what we use." Tr. at 259.

In fact, USESC formally deems unconfirmed complaints to be sufficiently reliable to prohibit the accused sales agent from further solicitation pending review. In the letters "sent to contractors notifying them of allegations," USESC Ex. 5.0 at 11, the company requires the contractor "to cease all marketing activity on behalf of [USESC] until your presentation has been reviewed by the regional distributor." USESC Ex. 5.2.

Furthermore, the company itself has verified the legitimacy of many of the complaints brought to its attention. Several individual confirmed complaints are

---

[29] Mr. Potter's testimony was consistent in this regard. For example, he further stated that "we monitor each week the complaint rates, which are basically the number of complaints over the number of sales." Tr. at 761. He also testified that Respondent tries to "keep the number of complaints…relative to the number of contracts below 2%," which he described as the company's "benchmark," *id*. (a benchmark he "tried to push to 1 percent," Tr. 765). Additionally, he declared that "we use complaint rates. That's my trigger to see how we're doing." Again, these remarks reflect that USESC fully recognizes the linkage between sufficient management and complaint volume.

discussed later in this Order. On a broader scale, Complainants maintain that USESC validated 1730 of the 1814 misrepresentation-related complaints received throughout 2007-2008. CG Ex 3.0 at 24-25. The numerical accuracy of that assertion was disputed in this proceeding (and USESC cited extra-record matter in an effort to disprove it). That does not alter the fact that Respondent has confirmed a substantial number of complaints while selling its gas contracts in Illinois, thereby invalidating its charge, in the heat of litigation, that customer complaints are "inherently" unreliable. Moreover, it ultimately does not matter if the company disparages customer complaints. The General Assembly does not share that disdain, as discussed above.

That said, the Commission does agree with USESC (and does not perceive any party to disagree) that not all consumer calls (or emails or letters) to a consumer watchdog, government entity or Respondent itself are necessarily complaints[30]. But that is true for all suppliers[31]. If all consumer contacts were reduced by a common factor, to remove positive or neutral contacts, there would still be an industry norm of actual complaints per supplier, and USESC would still be far above it. The same principle applies to the company's argument that not all complaints are valid. Again, the Commission assumes that every gas supplier is subject to complaints that are not sustainable and that when those are factored out, an industry norm remains.

USESC also criticizes Complainants for relying solely on absolute complaint numbers, without taking USESC's market share into account for comparison purposes. Staff concurs that "[l]arge volume, by itself can simply arise as a byproduct of market share." Staff Ex. 1.0 at 7. Consumer Groups similarly acknowledge that "it is important to consider the volume of complaints in light of the volume of business conducted by the marketer." CG Ex. 3.0 at 19. But USESC's contention that Complainants ignored market share mischaracterizes the record.

CUB compared complaints as a percentage of customers for Respondent and for the three largest Illinois gas utilities, the largest electric utility and a large gas and electric utility, using customer contacts recorded by CUB for each supplier from January 2007 through September 2008. CUB Ex. 5.0 at 2-3. USESC had approximately 100,000 customers[32] and was the subject of 1900 complaints, or 1.9% of its customer

---

[30] The Commission notes that Respondent demonstrated only that CUB – but not our Staff or the BBB – treats all customer contacts as complaints. USESC IB at 14. Also, the complaints analyzed by Consumer Groups witness Alexander were vetted to weed out inquiries and allegations unrelated to sales practices. CG Ex. 1.0 at 5-6. Nonetheless, the proposition that USESC advances about the varied nature of consumer calls has general application, irrespective of how a call recipient classifies the calls.

[31] Ironically, one of Respondent's own arguments suggests that a greater proportion of the consumer contacts directed at CUB (as contrasted with the other entities mentioned in this case) are in fact complaints. As previously discussed, USESC emphasizes evidence of CUB inviting customer complaints. USESC IB at 19. The company cannot have it both ways, asserting simultaneously that CUB solicited complaints but received mere inquiries. Additionally, USESC acknowledges that door-to-door sales tend to elicit more consumer complaints than do other sales methods. Tr. at 735 & 737 (Potter). USESC is the only gas supplier relying on door-to-door sales in Illinois. *Id*. at 739-40.

[32] CUB's estimate, at CUB Ex. 5.0 at 3, is mirrored in Respondent's testimony at USESC Ex. 5.0 at 6.

base[33]. *Id.* Peoples Gas had 784,271 customers and was the subject of 2060 complaints (160 more complaints from almost 700,000 (or 700%) more customers), or 0.26% of its customer base. *Id.* The next highest complaint ratio was 0.12% of customer base. *Id.* Respondent's complaint ratio thus exceeded the next-highest ratio by more than a factor of seven[34].

The Commission disagrees with USESC's objection that complaint comparisons with gas utilities (rather than with AGS) are inappropriate because, first, there is a "limited universe of complaints that customers can have about an AGS," USESC IB at 18, and, second, incumbent utilities do not have to "actively market to customers." USESC Ex. 5.0 at 17 (Potter). These arguments undermine Respondent's position more than they help it. Gas utilities have significant a significant number of bundled customers, for whom they provide both fuel and delivery. That USESC performs fewer functions for customers, yet generates an outsized complaint ratio, is not in the company's favor. Moreover, the need to sell USESC gas contracts actively, in order to "develop brand recognition," *id*., is no justification for engendering customer disapproval (ironically, *negative* brand recognition). Indeed, one reasonable inference, given the volume of Respondent's sales-related complaints, is that the need to establish market share has compromised the company's oversight of its sales force.

Furthermore, Respondent would fare no better if its complaint performance were compared only with other AGS. The company serves more residential customers (approximately 100,000) than any other AGS in Illinois. *Id*. at 13. CUB recorded about 800 consumer complaints concerning 12 other AGS from January 2007 through September 2008 (compared to 1900 USESC-related complaints). CUB Ex. 5.0 at 3. If, for the sake of argument, *all* of those 800 complaints were attributed to a single competing AGS, and if that AGS had only half as many customers as USESC (*i.e*., 50,000), the competing AGS would still have a better complaint ratio than Respondent (0.016%). If we assume, more rationally, that the 800 complaints were spread in some manner among the 12 other AGS, the comparison with each only becomes more unfavorable to Respondent. An equivalent analysis of the complaints received by Staff, described in Staff Ex. 1.0 at 4-7, would yield a similar result. Moreover, if another AGS's complaint ratio were in fact well above industry norms, the proper Commission response would be investigation of that AGS, not exoneration of both that AGS and USESC.

The case for management insufficiency only grows stronger when the nature and repetition of customer complaints are added to the analysis. Misrepresentation regarding likely customer savings with was the subject of over half of the complaints directed to CUB and our CSD. More than half of the CSD complaints also involved

[33] CUB initially presented USESC's complaint ratio as 19% of customer base. After USESC witness Potter correctly noted that CUB was in error, USESC Ex. 5.0 at 15-16, the ratio was properly reduced to 1.9% in CUB Ex. 9.0 at 1.

[34] Importantly, this complaint ratio is consistent with Respondent's own expectations. USESC believes a ratio of complaints to signed contracts is "reasonable" if it does not exceed 2%. Tr. 761 (Potter). The Commission does not share that view and will address this at greater length below.

USESC's contract termination fees, and both CUB and Staff recorded a meaningful percentage of complaints regarding false identification by sales agents, slamming and language barriers. These complaints persisted over the time period relevant in 2007 and 2008. CG Ex. 3.3 & 3.6; Staff Ex. 1.0 at 8.

During that time period, the company itself was receiving complaints of the same types: "[o]f the customer inquiries that could be categorized as informal complaints, USESC recognized that some involved allegations of misrepresentation of price, savings, or identity of the sales contractor…Other informal complaints related to USESC's cancellation policy." USESC Ex. 5.0 at 29. "The majority of complaints that USESC received by early 2008 came from customers who reported being under the impression that USESC's fixed-price long-term supply product would result in savings relative to their local utility's supply charges." *Id*., at 30. This coalescence of complaints around specific activities ought to have both alerted USESC to identifiable problems and focused its corrective response.

However, the company acknowledges that it received "an increased level of complaints" *over time*, which peaked at a given (confidential) point during the relevant period. *Id*. at 28. Complainants show that the volume of complaints directed to Respondent continued to grow even beyond that point in time[35]. CG Ex. 3.3. The complaints initiated with CUB also trended upward in most categories, or remained consistent over time. CG Ex 1.0 at 7.

It is troublesome enough that a supplier would trigger an extraordinary degree of consumer disapproval in the first instance. It is worse when that market disturbance goes unchecked over many months. Even according company management time to recognize the nature and magnitude of the problem, the duration here is far too long. USESC was aware of substantial consumer disapproval of its sales activities before January 2007. In April 2006, CUB filed an earlier complaint with this Commission[36] that also alleged contravention of the DPTA through the company's marketing practices[37]. USESC recognizes that most of CUB's allegations in that case "were similar to the ones alleged in this proceeding." USESC Ex. 1.0 at 17. Although the previous complaint was voluntarily settled by the parties, its allegations should have kept management vigilant about its sales efforts.

Another essential element in Respondent's defense is that it has at all relevant times had directives and procedures in place to prohibit, detect and correct violations of internal policies and applicable law. There is, in fact, record evidence of such directives and procedures. However, the question is not whether USESC did anything at all, but whether what it did was *effective* to sufficiently manage its sales force. If it were

---

[35] That does not necessarily devalue the measures USESC implemented in February 2008, which would have had little time to take effect.

[36] Citizens Utility Board, Complaint requesting the ICC to order Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp. to cease and desist misleading marketing of gas offering, Dckt. 06-0337, filed April 24, 2006, dismissed by Order Oct. 29, 2006. AARP was not a party in that proceeding.

[37] Complaint, para. 9 (admitted in the Answer at 3).

otherwise - if the Commission had to treat AGS policies and procedures as sufficient irrespective of their effectiveness - we could not protect energy consumers from minimal, under-enforced or poorly conceived compliance measures. The General Assembly put AGS under Commission jurisdiction to ensure more than the formal trappings of management. It expected *effective* management. Indeed, when it perceived that its expectation had not been fulfilled, the legislature amended the AGSL in 2009 to specifically require the Commission to assess, *inter alia*, an AGS' "ability to *properly manage* solicitation and authorization."[38]

Here, despite whatever measures were in place before and during the relevant time frame, USESC generated a complaint volume far in excess of industry norms, as well as significant litigation. In addition to the 2006 CUB complaint and the instant case, Respondent was also sued, on February 2, 2008, in the Circuit Court by the Illinois Attorney General for alleged violations of the CFA[39]. USESC Ex. 5.14. The company voluntarily settled that case without admission of violation, agreeing to, *inter alia*, an extensive list of controls on its door-to-door sales and service authorizations. *Id*. It also established a one-million dollar settlement fund. *Id*. Respondent's compliance management was plainly inadequate to the task of precluding adverse consequences for itself and the public during the relevant time frame.

Furthermore, the company misses the point when it emphasizes its follow-up investigations of purported sales agent misconduct[40]. Complaints need to be reduced, not merely addressed later. Customers suffer disruption, aggravation and cost when induced to change their gas supplier by actual or perceived misrepresentation. Any time spent unwinding a tainted sale is time wasted. Consequently, the effectiveness of an after-the-fact disciplinary scheme lies in the degree to which it reduces violations. If it does not, then it is either insufficient or the misbehavior it addresses is unpreventable. Given the inherently problematic nature of door-to-door sales, the latter may be true, and the only effective response may be to ban such solicitation. Short of that, the gas supplier must wield measures that drive violations to a minimum, not permit them to proliferate. "[I]t is reasonable to expect a company employing a door to door sales force which is compensated with an incentive payment structure…to anticipate and take reasonable precautions against foreseeable problems." Staff Ex. 2.0 at 9.

The Significance of "Validated" Complaints

Respondent emphasizes that the customer complaints that Consumer Groups and Staff rely on as evidence of insufficient management are merely unproven allegations. That is not enough, the company maintains, because "[i]n order to prove that fraudulent conduct was occurring on an ongoing basis, Complainants must first prove the particular instances on which fraudulent conduct actually occurred." USESC

[38] 220 ILCS 5/19-112 (effective April 10, 2009) (emphasis added).
[39] People of the State of Illinois v. Illinois Energy Savings Corp., Case No. 08 CH 04913, Stipulated Final Judgment and Consent Decree, May 14, 2009, Circ. Ct. Cook County ("AG-USESC Consent Decree").
[40] *E.g.*, "Complainants are unable to point to a single customer complaint that the Company did not investigate." USESC RB at 17.

IB at 12. The Commission agrees that when the question is whether statutory fraud occurred, statutory fraud must be proven - and we adhere to that principle in our disposition of Consumer Groups' allegations under the CFA and DTPA, discussed below. But when the issue is management deficiency under the AGSL, Staff is correct that "fraud need not be proven." Staff RB at 6. For the reasons already set forth, the volume, nature and repetition of consumer complaints correlate with management sufficiency. That maxim is derived not only from the Commission's long experience as the regulator of the retail, intra-state energy market, but also from the testimony of Consumer Groups witness[41], our Staff's consumer services unit and a representative of the BBB.

Moreover, USESC does not indentify the process, or degree of proof, it believes necessary to "validate" consumer complaints. Presumably, it does not expect a full-blown trial for each complaint. Indeed, Respondent conducts no such hearing before imposing consequences on its own contractors after customer complaints. *E.g.*, USESC Ex 2.0 at 5. Accordingly, USESC may only be suggesting the sort of investigation it typically performs, which consists of (depending on the allegation) review of the available contract, verification tape and file notes and, in some cases, conversation with the customer and/or contractor involved. *Id*. at 3. That is not meaningfully different from the investigation our Staff conducts for consumer complaints. Staff Ex. 1.0 at 4.

Furthermore, complaints received by CUB and the BBB are forwarded to the company, where the investigative process described above is purportedly employed. Respondent thus knows how the number and percentage of complaints it has "validated" by its own processes. Had those processes demonstrated that many complaints were unsustainable, Respondent could have offered evidence to that effect. It did not.

Instead, Respondent quarreled with Complainants' and Staff's interpretation of complaint-related "Agent Allegation Reports" obtained from the company through discovery[42]. "Complainants clearly did not understand or deliberately disregarded the meaning of the contents of the Agent Allegation Reports." USESC RB at 14. There are a handful of Agent Allegation Reports in the record (USESC Ex. 5.3 and CUB Cross-Ex. 5) and they contain a column entitled "validity," with an entry of a zero or a positive number for each "incident." Consumer Groups witness Alexander presumably construed the positive numbers to show validation of the complaint incidents. CG Ex. 3.0 at 24-25.

[41] Ms. Alexander was formerly the Director of the Consumer Services Division of the Maine Public Utility Commission and testified, without opposition, as an expert on "consumer protection policies and programs targeted to residential customers in emerging competitive markets for the sale of electricity and natural gas." CG Ex. 1.0 at 1-2.

[42] According to Complainants, those reports showed that the "Company itself confirmed *1,730 valid customer complaints of misrepresentation by 268 different sales agents* over just a two-year period." CG IB at 4 (emphasis in original).

USESC could have explained the components in the Agent Allegation Report, having included three of them in its own Exhibit 5.3 and describing them as examples of then-current intra-company correspondence[43]. USESC Ex. 5.0 at 11 (filed in December 2008). It did not[44]. The Commission is puzzled that Respondent would present evidence of management sufficiency, fail to explain what its components mean, then heatedly criticize other parties for misconstruing that meaning[45]. If it were necessary here for the Commission to determine whether Complainants have fairly interpreted the meaning of the Allegation Reports, we would conclude that they reflect validation of complaints on certain incident dates. That is certainly what they appear to say, and USESC offers no other explanation[46]. Complainants' numerical summary of the data in the reports would therefore be considered evidence of complaints confirmed.

But a determination regarding Respondent's own view of the validity of its customer complaints is ultimately beside the point. The efficacy of USESC's post-complaint activities is measured by their success at reducing complaints to the norm of the retail gas market. If the company found few complaints valid, yet complaints continued at an extraordinary pace, there would still be management deficiency. Conversely, if Respondent found most complaints valid, but substantially reduced complaints, that would suggest management sufficiency. The principal value of USESC's own complaint validations is as an admission against interest in litigation[47].

<u>The Causes of Management Deficiency</u>

USESC's longstanding benchmark of 2% for the ratio of complaints to sales, Tr. 761 (Potter), was a likely contributing cause of its abnormal complaint volume during the relevant time frame. That ratio was, and remains, too high. It means 2000 complaints for every 100,000 customers signed[48], which approximates USESC's customer base

[43] One of the Reports includes an incident in September 2008.

[44] Indeed, in its pre-filed testimony, Respondent did little to clarify the functional ambiguity among the various form letters it sends to contractors and distributors. For example, what USESC described as an "allegation letter" actually orders the pertinent sales agent to cease all solicitation pending a supervisor's review, and also levies a $25 investigation fee. USESC Ex. 5.2. The functional distinction between an "allegation letter" that essentially imposes penalties, and the facially similar "penalty letter," USESC Ex. 5.4, is not readily apparent.

[45] This became the subject of motion practice among the parties. Although Respondent's Reply Brief referred to matter outside the record in an effort to show what the "validity" column in Agent Allegation Reports did *not* mean, the company never endeavored to explain what it *does* mean. The extra-record references in the Reply Brief were stricken from the record by an ALJ Ruling dated January 8, 2010.

[46] In fact, Mr. Potter agreed that the company's discovery responses included a very large number of letters to contractors with "validly determined allegations." Tr. 484. It is not entirely clear that he was referring to Agent Allegation Reports, however.

[47] That said, there is undisputed record evidence of complaint validation by the company. For example, correspondence dated May 29, 2008 summarizes 11 confirmed instances of misconduct at one Chicago area sales office (nine of which were alleged during the relevant time frame). USESC Ex. 5.3. Two more complaints for the same office, and another at a different office, are confirmed in USESC Ex. 5.4. The complaint by CUB witness Vargas was also validated. USESC Ex. 2.0 at 5. This tells us what we already knew – that some consumer complaints are valid and some are unsustainable.

[48] In 2007, the company sold approximately 130,000 contracts, Tr. 435 (Potter), which would yield a benchmark of 2600 complaints.

during the relevant time period (discussed earlier)[49]. USESC's complaint ratio (as recorded by CUB) for the customer base (1.9%) is essentially the same as its 2% benchmark for contracts signed, and it greatly exceeded the ratios of the gas and electric utilities studied. CUB Ex. 5.0 at 2-3. Mr. Potter characterized a 2% complaint ratio as "reasonable" based on USESC's particular "business model" (door-to-door solicitation). Tr. 762. That ratio is unacceptable to the Commission and again calls the efficacy of door-to-door business model into question. In any event, it is deficient management to establish a 2% benchmark for a retail gas supplier.

Another likely (and related) contributing cause of Respondent's complaint volume is its tolerance for customer cancellations and drops. For example, 60% of all contracts signed from February 2008 to November 2008 were cancelled or dropped by the customer, the company or the utility that would have delivered gas[50]. Tr. 499 (Potter). Approximately 20% of total sign-ups were cancelled at the customer's behest within 70 days of sign-up in both 2007 and 2008. *Id*. at 509. An overwhelming majority of customers that cancelled or were dropped in 2008 were not assessed a contract termination fee, (indeed, the total number of customer-initiated cancellations alone vastly exceeded the number of termination penalties imposed). CUB Cross-Ex. 14. USESC clearly accepts a high degree of customer turn-over, which necessitates the sale of additional contracts. As Mr. Potter explained, if the company cannot sell its prepaid gas supply within a given time, internal policies require immediate wholesale disbursal, even at a loss (which must be included in public reporting). Tr. 731. A likely result of this self-induced pressure to make high volume sales is high volume complaints. It is deficient management to create such incentives in the retail gas market.

A third likely cause for the wave of customer complaints against the company is the intrinsic tension between what its sales contractors can lawfully say about its product and the characteristics of the product itself. USESC touts its gas service as a price stability product, because it does not vary over the contract's life. USESC Ex. 1.0 at 4. To make that a value proposition for customers, the salesperson must emphasize the volatile nature of the utility's competing price, which fluctuates over time. Inherently, the contractor (like the company's brochures, *e.g.*, USESC Ex. 1.5) will have to emphasize the prospect of upward fluctuation - the customer has little incentive to sign a contract to avoid downward fluctuation of the utility's price. That is a slippery slope for a salesperson on commission. The temptation to suggest, or even predict, rising future utility gas prices - and corresponding savings for a customer on USESC's fixed price - is patent[51]. Moreover, the sales agent is already at a price disadvantage on the date of sale, when the utility's price is typically lower. USESC Ex. 1.0 at 4. Even for a contractor working entirely in good faith, there is a fine line separating permissible salesmanship and misrepresentation about future gas prices. While the company may

[49] Some of these are the same customers. Although many customers who sign contracts later cancel or are dropped, others remain with the company.
[50] 36, 939 of 61,216 contracts signed. Tr. 499 & CUB Cross-Ex. 14.
[51] As CG witness Alexander sees it, Respondent's contractors are actually "trained to think of the USESC fixed price product as producing savings to customers." CG Ex. 3.0 at 27.

say in response that it retains thousands of customers, it is equally true that thousands more have left, many with complaints.

Consumer Groups and Staff attribute USESC's prodigious complaint history during the relevant time frame to additional causes. Both parties posit that the company's complaints were (and remain) linked to inadequate supervision of the direct interaction between salesperson and customer at the latter's doorway. CG IB at 34; Staff IB at 9-11; Staff RB at 26. Both also target the company's commission-only compensation structure, which they contend created (and still creates) a perverse incentive to sell contracts without regard to legal constraints. CG IB at 5; Staff IB at 15-19. They also cite haphazard and inconsistent investigation and enforcement of company policies, CG IB at 26-29; Staff IB at 12-13, and Staff emphasizes a lack of appropriate and effective complaint tracking and handling procedures. Staff Ex. 1.0 at 18.

Complainants and Staff, also point to Respondent's sales verification process, which Complainants believe "reinforce[s] the aggressive sales tactics occurring at the customer's door." CG IB at 30; Staff IB at 9-10. Consumer Groups maintain that the verification procedure has allowed both the verifier and the contractor to "lead" the customer, and that verification scripts included marketing and contained long compound questions that ask the customer to agree to multiple items with a single assent. CG IB at 32.

Staff also stresses the lack of upper managerial presence in Illinois and the absence of meaningful authority for the Distributors located in this State. Staff Ex. 2.0 at 10-11. Consumer Groups ascribe USESC's torrent of similar complaints to a deliberate policy of targeting elderly, low-income, non-English-speaking or other minority customers. CG IB at 41.

Respondent strongly disagrees that the foregoing dynamics even exist, and therefore denies that they were causes of management deficiency. Indeed, it denies that its management was deficient at all during the relevant time frame. USESC IB at 60. The Commission's concludes otherwise. USESC engendered far too many consumer complaints, compared to other suppliers, and it attracted large clusters of similar complaints, from January 2007 through March 2008. That is management insufficiency within the meaning of subsections 19-110(e) and 19-115(b) of the Act. It is Respondent's duty to consider the likely causes discussed above and identify those that triggered so much customer disapproval. It must then adopt measures that will effectively and substantially reduce consumer complaints about, and legal violations associated with, its contract sales.

2. NO VALID CUSTOMER AUTHORIZATION – SUBSECTION 19-115(c)

In Count IV, Complainants also charge that "USESC's practices…have resulted in changing customers' suppliers without authorization."[52] They similarly complain about "USESC's practice of failing to obtain verifiable authorization from a customer before the customer is switched from another supplier."[53] In testimony, Staff mentions slamming complaints and recommends revisions to Respondent's sales verification methods. USESC denies Complainant's allegations and has opposed them throughout the case.

a.) Parties' Evidence & Arguments

Complainants contend Respondent has been violated AGSL subsection 19-115(c), which stated, during the time relevant to this proceeding, that "[a]n alternative gas supplier shall obtain verifiable authorization from a customer, in the form or manner approved by the Commission, before the customer is switched from another supplier."[54] The specific violations alleged pertain to the "shall obtain verifiable authorization" clause in the subsection.

The particular unlawful activities purported here are slamming (including by signature forgery), obtaining authorization from a person other than the customer and inducing a customer to provide authorization by fraud or confusion regarding the nature of the transaction. *E.g.*, CG Ex. 1.0 at 29. Complainants assert that USESC's own records show 115 valid instances of unauthorized signature on the contract during 2007 and 2008." Consumer Groups IB at 38, citing CG Ex. 3.6. Also, eight percent of the customer complaints reviewed by Consumer Groups witness Alexander involved such activities. CG Ex. 1.0 at 7, Table 1. However, in the narrative testimony associated with that quantification, Ms. Alexander mentions only four complaints in her direct testimony, *id*. at 29, and four more in her surrebuttal. CG Ex. 3.0 at 32, for which she also reviewed the third-party verification tapes. CG Ex. 3.8. Additionally, CUB sponsored the testimony of Catherine Vargas, CUB Ex's. 3.0 & 6.0, who stated that she was slammed in early 2008 by a USESC sales contractor who apparently impersonated her during the third-party verification. CUB Ex's. 8 & 8A.

USESC concedes that Ms. Vargas was switched to its gas service without proper authorization[55]. USESC IB at 48. However, Respondent stresses that "the sales contractor's actions were directly contrary to the Company's practices, and done without Company knowledge or approval," *id*. at 49, and that it promptly canceled the tainted contract, returned Ms. Vargas' account to the utility and notified other customers procured by the fraudulent contractor. *Id*. at 48. Moreover, the company contends, if a finding of violation were based on a single incident, the Commission would be imposing an unreasonable perfection requirement. USESC RB at 28.

---

[52] Complaint at 9, para. 26(b).
[53] *Id*., para. 26(c).
[54] 220 ILCS 5/19-115(c).
[55] The sales contractor apparently impersonated Ms. Vargas during the verification call. CUB Ex's. 8 & 8A.

Respondent further argues that the individual complaints reviewed by Ms. Alexander contain only “untested allegations,” and that there is no proof the contractors involved knew they were obtaining consent from unauthorized persons. *Id*. at 28-29. As for the 115 “validated” acts of authorization-related misconduct in USESC’s own records, the company again objects that Consumer Groups are confusing allegations with validated findings. *Id*.

b.) Commission Analysis

Initially, the Commission agrees with USESC that the Vargas incident does not, by itself, prove that the company “has a *practice* of switching customers’ gas suppliers without authority.” USESC IB at 49 (emphasis added). Indeed, even when the Vargas incident is, for argument’s sake, added to the four others discussed in CG Ex. 3.0 at 32, we do not find a “practice” of unauthorized switching. The number of incidents is too small.

However, the Commission does not believe that a “practice” must be proven in order to establish a violation of the subsection 19-115(c) requirement to “obtain verifiable authorization.” While a systemic problem – or “practice” – would typically be necessary to sustain a finding of violation of management deficiency under subsections 19-110(e) and 19-115(b), there is no minimum number of non-compliances needed to affront 19-115(c). It is a different subsection, which anyone with a cognizable interest under our rules can seek to enforce via complaint under Section 19-120, just as a party can seek enforcement of, say, Sections 8-201 through 207 of the Act (as incorporated into subsection 19-115(b)(1)[56].

Here, in addition to the blatant contractor misconduct in the Vargas incident, the Commission finds switching without verifiable authorization in two of the four instances addressed in CG Ex. 3.0 at 32, as confirmed by the verification call transcripts included in CG 3.8. Regarding the customer whose initials (in CG Ex. 3.8) are “TS,”[57] the sales and verification agents did nothing to confirm that the person with whom they were conversing had any authority or spousal relationship with the account holder (a person with a different last name). CG Ex. 3.0 at 31-32 & CG Ex. 3.8. This is especially troublesome, given that Respondent’s “Performance Management Matrix” classifies utilization of such unauthorized signatures as a Tier 2 infraction with substantial formal penalty for the contractor involved. CUB Cross-Ex. 4. We also switching without verifiable authorization with respect to the customer whose initials (in CG Ex. 3.8) are “NH,” who plainly did not comprehend the nature of the transaction.

The Commission does not find switching without verifiable authorization in the other two of the four instances recorded in CG Ex. 3.8. The transcripts of customers “DF” and “LW” (in CG Ex. 3.8) do not, by themselves, demonstrate flawed or absent

[56] 220 ILCS 5/8-201 through 8-207.

[57] The customer’s full name appears in the confidential exhibit. Here, and at certain other places in this Order, we substitute initials for names in the record.

authorization. The audio transcripts of these verification calls might have enabled our ALJ to detect misconduct, but they were not put in evidence[58].

In USESC Ex. 5.3, in correspondence from upper management dated May 29, 2008 and July 17, 2008[59], the company confirmed switches without verifiable authorization by the same contractor (initials "BC") alleged on, respectively, May 16, 2008 and July 5, 2008. There are equivalent confirmations for two other sales contractors ("JD" and "MS") in the May 29, 2008 letter, pertaining to allegations raised on, respectively, February 26, 2008 and April 2, 2008. In USESC Ex. 5.4, a November 1, 2007 penalty letter from upper management verified a switch without verifiable authorization alleged on October 3, 2008 for contractor "MC." In that instance, the company imposed a penalty based on an allegation of forgery.

Adding the Vargas incident, the two violations demonstrated by Ms. Alexander and the five violations described in the preceding paragraph, the Commission finds eight violations of subsection 19-115(c). We do not view this as a trivial number. Indeed, each of these offenses caused aggravation and disruption for the affected customer and is, for that reason, actionable and punishable under the statute. US plainly agrees that unauthorized switching is a serious matter, given the magnitude of the penalties formally prescribed for violations in its Performance Management Matrix. CUB Cross-Ex. 4.

3. FAILURE TO DISCLOSE – SUBSECTION 19-115(f)

Additionally, Complainants assert in Count IV that Respondent violates the AGSL through "practices of failing to disclose to its customers in plain language, the prices terms and conditions of the products and services being offered and sold to the customer."[60] USESC denies this allegation and has opposed it throughout the case. Within the relevant time frame, subsection 19-115(f) provided that:

> An alternative gas supplier shall comply with the following requirements with respect to the marketing, offering, and provision of products or services:
>
> (1) Any marketing materials which make statements concerning prices, terms, and conditions of service shall contain information that adequately discloses the prices, terms and conditions of the products or services.

[58] Curiously, USESC derides Complainants for not providing the audio recordings. USESC RB at 28. This has worked to Complainant's detriment, not Respondent's. Furthermore, the company could have proffered the audio recordings itself if it believed that would have strengthened their case, as they did during cross-examination with the recording of Mr. Zermeno's verification call. USESC Cross-Ex. 1A.
[59] While the second of these violations was alleged after the relevant time frame in this proceeding, the Commission deplores the repeat violation by a sales agent that ought to have been dissuaded from misconduct by the company discipline imposed in the May 29, 2008 letter.
[60] Complaint at 9, para. 26(d).

> (2) Before any customer is switched from another supplier, the alternative gas supplier shall give the customer written information that adequately discloses, in plain language, the prices, terms, and conditions of the products and services being offered and sold to the customer.

a.) Parties' Evidence & Arguments

Complainants point to certain marketing materials they believe violate the foregoing statute. The first is a brochure that sales agents present to customers, entitled, "The Benefits of a Long Term Fixed Price vs. Variable Market Price." It contains a chart that compares a straight line fixed price with a volatile line that moves primarily higher than the fixed price." CG Ex. 1.0 at 22. The material encourages customers to "Lock in now and protect yourself against further increases." *Id*.

Second - and similarly - Consumer Groups cite a sample welcome letter (USESC Ex. 1.6) that the company sent to new customers. Under the heading "Natural gas commodity price information," it also includes a chart comparing a fluctuating line (illustrating Nicor Gas' commodity prices from May 2003 to August 2008) to a point representing USESC's fixed price (just under $1.20/therm). Complainants emphasize that the fluctuating (Nicor) line "shoots up to the range of roughly $1.50 per therm for the month of August [2008]," although the welcome letter is dated July 14, 2008. Consumer Groups IB at 40. Therefore, Complainants assert, the welcome letter "clearly is designed to enforce the notion that prices are shooting up - a fact USESC acknowledges it cannot determine - and that the customer is lucky to have natural gas prices locked in." *Id*.

Third, Consumer Groups assert identify marketing materials used in Illinois (but not designed specifically for Illinois) that stated that customers have "saved millions of dollars over the terms of the agreements." CG Ex. 1.0 at 22-23. According to Complainants, Respondent's own evidence, particularly at USESC Ex. 5.0 at 24, supplies "no credible basis to support a claim that Illinois customers have saved 'millions of dollars,' the clear intent of that statement." Consumer Groups IB at 40.

Complainants' conclusion is that USESC's marketing materials, in conjunction with its in-person sales program, are "designed to hide the likely adverse result of entering into a 4– or 5–year fixed price contract that is, in almost all cases, higher than the prices charged by utilities for regulated natural gas supply service." *Id*. at 39.

In its Initial Brief, USESC favorably describes several of its written marketing materials, sales contracts and verification letters. USESC IB at 49-58. Complainants do not address many of these documents and, for that reason, the Commission sees no need to summarize the company's discussion of them. Consumer Groups bear the burden of proof here, and if they did not frame an issue for our consideration, the sufficiency of Respondent's defense is immaterial.

Regarding, the marketing materials Complainants expressly address, USESC says that the brochure containing the exhortation to “Lock in now and protect yourself against further increases” was not in use after September 2005, well before the relevant time frame in this case. USESC RB at 29. That fact, if true, also affects the relevance of the price-comparison graph in the same brochure.

With respect to the July 2008 welcome letter that also contains a price comparison graph, USESC points out such letters are sent only after a customer has selected the company’s service. “Therefore, it cannot influence the decision to sign.” *Id*. at 31, fn. 4. As for the reference to “millions of dollars” of customer savings in other marketing materials, Respondent alleges that it was referring to aggregate customer savings from multiple jurisdictions, not just savings in Illinois. *Id*. at 30-31.

b.) Commission Analysis

We are dismayed with the parties’ presentations with respect to the sales brochure that USESC says it ceased distributing in 2005. The company attempts to establish that fact with data requests and responses that were never admitted as evidence. *Id*. at 29-30. That is utterly improper and the data requests cannot be used for decision-making. Moreover, Complainants’ witness discussed the brochure in *direct* testimony filed in August 2008. USESC could have addressed its distribution dates with an appropriate motion, or in its own subsequently filed testimony (two rounds), or during the three days of hearings conducted in October 2009. On the other side of the coin, if Complainants knew that the brochure was no longer in distribution during the relevant time frame here, it was highly improper not to reveal that fact. Furthermore, in the section of the pertinent pre-filed testimony addressing this matter, Consumer Groups invite the Commission to “see” certain data requests and answers, CG Ex. 1.0 at 22, fn’s 21-24, without entering those materials in evidence. The Commission cannot “see” outside the evidentiary record. This collection of procedural errors obscures the substantive issue raised by the brochure.

That same substantive issue is framed, however, with regard to USESC’s July 2008 welcome letter. Although July 2008 is beyond the case’s relevant time frame (which the company identifies as “between January 2007 and March 2008,” USESC IB at 1), Respondent attached it to its direct testimony (USESC Ex. 1.6). The Commission presumes that the company was relying on the notation under the relevant graph indicating that it was “approved” on February 25, 2008[61]. The welcome letter improperly purports to depict an increase in *future* Nicor gas commodity prices. That, we note, is especially ironic for an AGS whose principal marketing message is that consumers should use Respondent’s fixed price as a shield against *unpredictable* future price fluctuations.

[61] USESC further states that the welcome letter was provided to all customers “since February 2008.” USESC RB at 60.

Moreover, the price depiction significantly distorts the price disclosure required under subsection 19-115(f), by presenting the consumer with an unwarranted comparison. Indeed, the company *both* depicts that comparison graphically and emphasizes it in the accompanying text, where it asserts that prices have "fluctuated [up to] $1.45/therm" (an assertion supported only with the forecasted price). USESC Ex. 1.6. The Commission concurs with Consumer Groups that the intended message to customers is that USESC's fixed price will increasingly undercut Nicor's price. The Commission observes that had USESC not elected to present this distorted price comparison, but simply depicted the utility's price, it would not have affronted subsection 19-115(f) (as written during the relevant time frame)[62], which concerns the AGS' pricing and terms, not the utility's. For that reason, we cannot find fault with the utility price depiction in USESC Ex. 1.5, which Complainants belatedly mention in their Reply Brief at 9. Respondent's own price is not disclosed there, much less distorted.

The Commission rejects Respondent's defenses of the price disclosure in the welcome letter. The fact that the letter is sent to the customer after contract execution does not matter under subsection 19-115(f), which applies broadly to the "marketing, offering and provisioning" of gas service. The letter is part of the company's "offering" process. Furthermore, it was sent during the contract cancellation grace period thereby distorting the customer's assessment of whether to stay with USESC.

Respondent's other defense - that the price comparison was "inadvertent," USESC RB at 55 - reflects further disregard for proper procedure. Inadvertence was never the subject of record evidence, although USESC had many appropriate opportunities to assert this purported lack of intention underlying *its own* exhibit. In any event, inadvertence is not a defense to deficient disclosure under subsection 19-115(f).

Concerning Respondent's claim of "millions of dollars" of customer savings, the materials ostensibly containing this claim are not in evidence. Consequently, we cannot determine whether the claims appear to be Illinois-specific (and, therefore, unsupported by the record). However, Complainant's own testimony is consistent with Respondent's contention that the materials are not Illinois-specific. CG Ex. 23, fn. 25. Therefore, for Complainants to meet their burden of proof, they would have to demonstrate either that the claimed "millions of dollars" of savings were presented in a manner that falsely suggested to this state's consumers those savings were Illinois-specific, or that the asserted multi-jurisdictional savings did not number in the millions. Neither of these propositions is addressed by the record, and the pertinent materials have not been made available for our direct assessment.

In sum, the Commission finds a single violation of subsection 19-115(f) in USESC Ex. 1.6, and no other violations in the materials discussed above.

4. VIOLATION OF THE CFA

[62] Other law, such as the CFA, might have applied, however.

In Count V of the Amended Complaint, Consumer Groups contend that USESC has contravened Section 2 of the CFA, which prohibits:

> [u]nfair methods of competition and unfair or deceptive acts or practices, including…any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the [DTPA]…in the conduct of any trade or commerce…. [63]

Complainants maintain that USESC affronted the foregoing statute with practices that: "fraudulently switched consumers from another gas supplier; misrepresented contracts as 'petitions for lower gas rates'; falsely promised a reduction in cost of gas; misrepresented its affiliation with other corporations and government programs; and concealed or omitted the cost of termination fees and other material facts."[64] Staff generally supports the Consumer Groups' position and asserts that USESC has committed the purported AGSL violation. USESC denies this allegation and has opposed it throughout the case.

a.) Parties' Evidence & Arguments

Relying on Connick v. Suzuki Motor Co., 174 Ill. 2d 482, 675 N.E. 2d 584 (1996), Consumer Groups maintain that a CFA claim has three necessary elements: (1) a deceptive act or practice by defendant; (2) defendant's intent that plaintiff rely on the deception; and (3) a course of conduct involving trade and commerce. CG IB at 47. Complainants underscore that there is no "honest mistake" defense to a CFA claim, and that even innocent or negligent misrepresentations made in good faith are actionable. *Id.* Complainants believe that record evidence shows that the foregoing elements have been proven.

With respect to deceptive acts or practices, Complainants emphasize that 51% of CG witness Alexander's complaint sample included misrepresentation of the likelihood of monetary savings with USESC, *id*. at 48, while significant numbers of consumers complained about misrepresentation of salespersons' identities or affiliations. *Id*. at 51. Consumer Groups stress that the BBB also reported a large volume of savings-related complaints, *id*. at 50-51, and that the company itself confirmed 1730 misrepresentation complaints during the relevant time frame. *Id*. at 49. Staff notes that the Commission's CSD similarly reported that 53% of its USESC-related complaints involved monetary savings. Staff IB at 26.

---

[63] 815 ILCS 505/2. Although Section 2 of the CFA, by its terms, includes violation of Section 2 of the DTPA as a CFA violation, Complainants do not explicitly address the DTPA in Count V of the Amended Complaint. Rather, they separately allege violation of Section 2 of the DTPA in Count VI, addressed *infra*.

[64] Complaint at 9, para. 29.

Regarding the intent to induce customer reliance on sales agents' false information and suggestions, Complainants assert that the agents knowingly contradicted USESC's training and formal policies - which instructed them to refrain from promising savings and, instead, to sell Respondent's supply as a price stability product - in order to make sales. *Id*. at 48 & 50. Complainants argue that such conduct is consistent with the incentives associated with commission-based compensation for sales personnel, and with the enhanced opportunity afforded by door-to-door sales to pressure the customer. *Id*. at 49.

As for the commercial context of the sales contractors' purported misrepresentations, no party disputes that the company's sales program occurs within trade and commerce. In fact, the company acknowledged engaging in trade and commerce within the meaning of the CFA in the Attorney General's enforcement action discussed earlier, People of the State of Illinois v. Illinois Energy Savings Corp., USESC Ex. 5.14.

Consumer Groups further maintain that the sales agents' alleged suggestions and promises of savings are, in fact, misrepresentations. CG witness Alexander compared USESC's contract prices during 2007 and 2008 with the corresponding commodity prices charged by the three utilities relevant here. She concluded that "the vast majority of USESC's products resulted in customers paying significantly more than what they would have otherwise paid to the utility." CG IB at 50. Also, Complainants underscore Respondent's own acknowledgement that "generally, though not always, USESC's fixed rate is higher than the monthly rate offered by the utility. *Id*., citing IESC Ex. 1.0 at 4. Accordingly, both Complainants and Staff assert that any suggestion that customer savings are likely through USESC's gas service is a misrepresentation.

In response, USESC avers that, according to Oliveira v. Amoco Oil Co., 201 Ill. 2d 134, 776 N.E.2d 151 (2002), there are actually five necessary elements to a private CFA claim[65]: 1) a deceptive act or practice; 2) with the intent that the complainant rely on the deception; 3) in the course of trade or commerce; 4) that the complainant suffered actual damage; and 5) that the deception was the proximate cause of the claimant's alleged injury. USESC IB at 67.

USESC's defense principally focuses on the first two of the foregoing elements of a CFA claim. USESC IB at 67. The initial part of that defense is that Consumer Groups have not proven - with the possible exception of the circumstances described in testimony by CUB witnesses Vargas and Zermeno - that deceptive acts have occurred or that reliance on deception was intended. *Id*. The company essentially relies on its previously analyzed argument that complaints are merely unproven allegations. *Id*. The second part of the company's defense is that even if deception and intended reliance *by sales contractors* have been demonstrated, that misconduct is not attributable *to USESC* under the law. *Id*. at 68-69. Respondent's principal support for

[65] A "private" CFA claim is one brought by someone other than the Attorney General or a State's Attorney.

this argument is derived from Bristow v. Griffiths Construction Co., 140 Ill.App.3d 191, 488 N.E.2d 332 (3rd Dist.1986).

USESC does not dispute that a sales agent's promise of monetary savings would be a misrepresentation. It does, however, assert that "it cannot be misleading for an AGS to suggest that a consumer *may* save money, because the proposition is, in fact, true." USESC IB at 43 (emphasis added). Respondent supports that proposition with evidence that almost all of the customers that contracted with USESC in 2004 and completed their multi-year commitment saved money. USESC Ex. 5.0 at 23.

b.) Commission Analysis

As we noted before in this Order, the CFA is one of the "other applicable laws" Respondent must adhere to under subsections 19-110(e)(5) and 19-115(b)(2). There are no other provisions of the AGSL pertinent to Consumer Groups CFA claim, so the necessary elements of a CFA violation are solely determined by the text of the CFA and applicable judicial precedent. The Commission agrees with Complainants that the elements comprising a CFA violation were enunciated by the Illinois Supreme Court in Connick v. Suzuki Motor Co., *supra*, (a deceptive act or practice, with intended reliance, involving trade and commerce). CFA Section 2 expressly states that damage is irrelevant to the unlawful nature of an act or practice. Of course, the additional elements (damage and proximate causation) indentified in Oliveira v. Amoco Oil Co., *supra*, would also apply if damage recovery were involved here. This case, however, is solely about whether Respondent has failed to "comply with" the law, as the AGSL requires. The Commission cannot award damages (as contrasted with refunds) in any proceeding.

The Commission will first consider the second part of USESC's defense (that any misconduct by contractors is not legally attributable to USESC*)*. The crux of the company's position is this - any responsibility it has for the misbehavior of its sales contractors is vicarious responsibility, and "under the theory of vicarious liability, the principal is only derivatively (not directly) liable for the agent's conduct…Vicarious liability does not shift fault to the principal [here, USESC]." USESC RB at 43. Therefore, Respondent says, "even if the Company could be held vicariously liable for a violation of the CFA by one of its contractors in another forum, the Company would not be considered a wrongdoer under the CFA." *Id*.

Given Respondent's reliance on Bristow, *supra*, for the foregoing propositions, certain questions arise. First, does Bristow, along with the principles articulated in that case, govern this proceeding? Bristow involved a common law tort claim involving personal injuries, in which the plaintiffs settled their claim against a truck driver, then sued his employer, based on the employer's derivative responsibility for an employee's negligence ("*respondeat superior*"). The instant case, in contrast, concerns a purported statutory violation (of the CFA). Respondent has not shown that the judicially-developed principles for resolving common law tort claims also govern alleged statutory violations.

Moreover, Bristow actually addressed the effect of *another* statute (the Contribution Among Joint Tortfeasors Act, a.k.a. the "Contribution Act"[66]) on the common law rule that an unqualified release of one tortfeasor also discharges all other tortfeasors. This specific question was certified for appeal: "Whether, after enactment of [the Contribution Act]…a convent not to sue in favor of an employee extinguishes the plaintiffs' right to seek recovery from an employer whose liability is solely derivative?" The present proceeding has nothing to do with whether the Contribution Act affects a common law plaintiff's ability to sue an employer after promising not to sue an employee. Additionally, it has nothing to do with whether an employer can seek indemnity from an employee after the employer is held liable for the employee's tort (a decisive question in Bristow). This case is simply not about USESC's entitlement to recover from its sales agents any money it might lose as a result of their misconduct.

Second, even though the instant complaint is not a common law tort action that implicates the effect of the Contribution Act on common law indemnity principles, are there rules or principles articulated in Bristow that govern this case? Again, as Respondent sees it, Bristow supports the proposition that "liability does not shift fault to the principal." The company's point appears to be that "liability" refers to financial responsibility, while "fault" refers to committing the act or omission that causes financial responsibility. But Bristow does not adopt that distinction for the purpose USESC suggests. With respect to third-parties (*i.e*., the injured plaintiff in Bristow or the allegedly deceived consumers here), there is no distinction between principal and agent. To the contrary, Bristow says that "[t]he liability of the master and servant [to the third party] for the acts of the servant is deemed that of *one tortfeasor and is a consolidated and unified one*."[67] Thus, insofar as the distinction between liability and fault matters, it is between principal and agent with respect to indemnity[68], not between those consolidated violators and the victimized third party. Bristow simply does not sustain the notion that USESC has no legal responsibility for the statutory violations of its sales agents.

Rather, the governing rule here is the legal axiom that the agent shares responsibility toward third parties for the misconduct of the principal. USESC does not appear to contest that its sales contractors are its agents. To the extent Respondent does contest that point, we reject its argument, based on the fundamental rules of agency set out in, among other authorities, Hoffman v. Morton Co., 35 Ill. App. 2d 97, 181 N.E. 2d 821 (1st Dist. 1968), which stated:

[66] Then codified at Ill. Rev. Stat. 1983, ch. 70, para. 301 *et seq*.

[67] 140 Ill.App.3d at 194, 488 N.E.2d at 335 (emphasis added), citing Towns v. Yellow Cab, 73 Ill. 2d 113, 382 N.E. 2d 1217 (1978).

[68] As Bristow explains, an employer can seek indemnification "for the reason that the employee owes his employer the duty or exercising reasonable care in the performance of his duties." 140 Ill.App.3d at 196, 488 N.E.2d at 336. In the present case, USESC has endeavored to secure full indemnity rights against its sales contractors through its contractor agreements. USESC Ex. 1.4, para. 10. It is worth noting that indemnity does not always inure to the benefit of the principal. If, for example, the employer's truck in Bristow had been mechanically defective, the employee might well have had a right to indemnity from the employer.

> The distinguishing characteristic of an agent is that he represents another contractually. When properly authorized, he makes contracts or other negotiations of a business nature on behalf of his principal, by which his principal is bound...An agent is generally defined by the Illinois courts as being one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter, who is called the "principal," and to render an account.

35 Ill. App. 2d at 102, 181 N.E. 2d at 823.

The company's sales contractors are certainly "representing [USESC] contractually." The stated purpose of the written agreement between USESC's corporate affiliate and its independent contractors is to "confirm the terms and conditions under which the Contractor, acting as in independent contractor, will provide door to door solicitation services to [Respondent's corporate affiliate] to assist [that affiliate] in *obtaining Contracts for the benefit of [USESC]*."[69] It makes no difference that the sales agents are independent contractors. "A person may be both an independent contractor and an agent for another… employed either for a single transaction or for a series of transactions[.]" Hoffman, 35 Ill. App. 2d at 102, 181 N.E. 2d at 823. Therefore, USESC's sales contractors are its agents and the company shares their responsibility for any wrongs they committed while attempting to sell contracts on USESC's behalf.

The question, then, is whether the sales agents in fact committed any wrongs within the meaning of the CFA - which brings us back to USESC's first defense (that Complainants have not proven up deceptive acts by sales personnel, since, in Respondent's view, complaints are no more than unproven allegations). In Commission litigation, the probative value of consumer complaints varies with the nature of the allegations at issue. In our application of subsection 19-110*(e)(1)* of the AGSL to USESC's performance as a certificated alternative gas supplier, the Commission concluded that an extraordinary volume of complaints, far in excess of industry norms, is enough to sustain a finding of management insufficiency, particularly when the complaints are similar in nature, continue over time and reflect a disruption of customer choice in the competitive market.

Application of the subsection 19-110*(e)(5)* "other applicable laws and rules" provision requires a different analysis, however, when the "other law" is not part of the Act and not directly enforced by this Commission. In such cases, we are obliged to hold the parties to the substantive standards expressly included in the pertinent statute,

[69] USESC Ex. 1.4, 1st numbered page (emphasis added). The agreement further states that "the Contractor is *only* acting on behalf of [Respondent's corporate affiliate] *in the solicitation of contracts for [USESC]*." *Id.,* para. 2 (emphasis added).

as interpreted by the courts[70]. Thus, a complaining party must prove that unlawful acts or practices, as described in the statute, *in fact took place*. It follows that the Commission will not find Respondent in noncompliance with the CFA where the preponderance[71] of record evidence establishes only that complaints have been lodged with the company or with third parties. Instead, we will find noncompliance where the preponderance of evidence proves the actual existence of “unfair or deceptive acts or practices” within the meaning of CFA Section 2.

Additionally, the Commission observes that Section 2 of the CFA, by its terms, prohibits both “acts” and “practices” that are unfair or deceptive. Consequently, either an individual act of misrepresentation or a broader or more repetitive practice affronts the CFA.

The record here establishes that Respondent’s sales agents violated the CFA in certain instances. In the case of CUB witness Vargas, the salesperson (Mr. Gray) obtained her account information under the false promise and misrepresentation of checking her eligibility for USESC’s service. CUB Ex. 3.0 at 2. Mr. Gray clearly intended that Ms. Vargas rely on his seemingly benign explanation. Mr. Gray then used the fraudulently obtained information to forge Ms. Vargas’ signature and impersonate her during the sales verification call. CUB Ex. 6.0 at 2; CUB Cross-Ex’s. 8 & 8A. While actual damage is not needed for a violation, Ms. Vargas alleges that Mr. Gray’s deceptive acts caused her monetary and other damage. CUB Ex. 3.0 at 3-4. Ms. Vargas’ testimony is unrebutted and a USESC witness agrees that her contract was “fraudulent.” Tr. 338 (Findley). A CFA violation is thus proven.

CUB witness Zermeno states that Respondent’s sales agent purported to represent Mr. Zermeno’s gas utility (Peoples Gas), suggested that Mr. Zermeno would save money by executing a contract and coached him during the sales verification call. CUB Ex. 4.0 at 1-2 & CUB Ex. 7.0. He also says that these misrepresentations and deceptive acts were carried out in English, a language Mr. Zermeno speaks only minimally. *Id*. The reasonable inference from this testimony is that the contractor intended for Mr. Zermeno to rely on his assertions and actions, so that a commission-generating sale would be completed. Mr. Zermeno alleges, and the company does not dispute, that the agent’s deceptive acts caused him monetary and other damage. *Id*. at 3-4. No record evidence contradicts Mr. Zermeno’s asserted facts, which are sufficient to establish a CFA violation.

However, USESC counters that Mr. Zermeno’s testimony was either dishonest or too contradictory to be credible. USESC IB at 31-32. Regarding credibility, Respondent asserts that if the witness’ ability to speak English is as limited as Mr. Zermeno’s claims, he could not have understood the agent’s ostensible misrepresentations, which were

---

[70] There is an instance in which the General Assembly has given this Commission *direct* enforcement responsibility under the CFA. Complaints asserting violation of Section 2EE of the CFA by electric service providers can be lodged directly with the Commission, pursuant to 815 ILCS 505/2EE(d).

[71] In private CFA actions, the complainant need only satisfy the preponderance of evidence standard, not the clear and convincing evidence standard. Avery v. State Farm Mutual, 216 Ill.2d 100, 835 N.E. 2d 801 (2005).

made in English. *Id*. at 32. The Company's argument ignores the specific sale misrepresentations Mr. Zermeno identifies, which are elementary ("Peoples Gas" and "save money") and require only the most rudimentary grasp of English to comprehend. As for honesty, the witness, testifying in Spanish through a translator, stated that he spoke "very little" (not "no") English. Tr. at 556. Moreover, during his sales verification call, he said only "hello," "yes" and "OK" and recited his name and single-digit numbers, purportedly with the agent's coaching. USESC Cross-Ex's. 1 & 1A. None of this either contradicts the sworn testimony that he speaks "very little" English or suggests that he understood the contractual nuances - or even the existence of alternative suppliers - in the retail natural gas market[72]. The Commission finds a CFA violation in the Zermeno transaction.

Respondent's own evidence establishes additional CFA violations. USESC Ex. 5.4 shows that the company issued a penalty letter dated October 26 , 2007 to contractor "JS," who, in September 2007, "misled [the customer] to believe that he was from Nicor who was offering her a deal." The customer asserted financial harm "[a]s a result of the misrepresentation." USESC does not refute these details; indeed, it confirmed them by penalizing the sales agent. As with Ms. Vargas and Mr. Zermeno, the most reasonable inference is that the sales agent intended that the consumer rely on the misleading representation in order to sell a contract. The elements of a CFA violation are therefore proven.

Also in USESC 5.4, a November 1, 2007 letter confirms that on September 7, 2007, sales agent "PE" "misrepresented the whole program" to a consumer. Correspondence dated May 29, 2008, from the company to Illinois Regional Distributors, USESC Ex. 5.3, confirms *another* identity misrepresentation by contractor "JS" on October 11, 2007, *two more* misrepresentation infractions by contractor "PE," on October 27, 2007 and February 7, 2008, and a misrepresentation by sales contractor "NA" on March 6, 2008. For the reasons already stated, intended reliance on those misrepresentations is the most reasonable inference. The Commission cannot discern from the company's exhibits whether the victimized customers purported to suffer damages. That does not matter, however, as CFA Section 2 explicitly states that the acts described in that statute are unlawful "whether any person has in fact been misled, deceived or damaged thereby."

The remaining issue is whether a salesperson's claim that the customer will, or probably will, realize savings with USESC is a misrepresentation. (We need not discuss deception about a sales agent's affiliation or purpose, or concealment of material facts, which are patent misrepresentations under the law.) Respondent's own understanding is that its fixed per-therm rate is generally higher than the local utility's rate. USESC 1.0 at 4. As Mr. Potter stated, "I think it is clear that customers do not choose our fixed

---

[72] As the company's Mr. Potter forthrightly recognizes, "the fact that I don't believe there is very much customer education, I think leans heavily to the fact that consumers are more easily confused and don't understand the choices in front of them." Tr. 743. The Commission believes that this remark, which concerned consumers in general, applies to Mr. Zermeno individually as well.

price products in order to achieve immediate price savings." USESC 5.0 at 26. Similarly, Mr. Hames, a USESC Regional Distributor, explained that:

> There is no guarantee as to what future prices will be and *that is why we are careful to teach our contractors that they cannot promise savings*. Of course, our fixed-price products offer the potential for savings, but it is simply impossible and therefore not reasonable to say whether a person will or will not save money until after the contract term is completed.

USESC Ex. 4.0 at 8 (emphasis added)[73]. Accordingly, Respondent's contracts expressly disavow savings, *e.g*., USESC Ex. 3.3, and the company maintains formal penalties for contradicting that provision, as the previously described exhibits demonstrate. Thus, any sales representation that savings will, or are likely to, occur would be false and against company policy.

Respondent nonetheless makes the point that a sales suggestion that the consumer *might* save money is not a literal untruth. USESC RB at 23. That point is conceptually correct, since the utility's fluctuating price, against which USESC's fixed price is measured, cannot be predicted, especially over five years. But Respondent's point is itself not the point. We are not talking here about contractors that indicated savings *might* occur. Rather, we are discussing contractors who promised or exaggerated the likelihood of savings, as established by record evidence, most of which is Respondent's own.

If the purpose of the company's emphasis on the few USESC customers that did realize savings was to show that savings promises are actually justified, Respondent has not achieved its purpose. Of the customers that entered into a four-year contract from February to December 2004 (USESC's first year as a certificated AGS) and completed that term, 98% realized savings (as compared to supply customers of the local utility). USESC Ex. 5.0 at 23. However, 38,811 consumers signed contracts in 2004, Tr. 435 (Potter), and only 59 (.0015%) completed them. USESC Ex. 5.0 at 23. While the Commission understands that customers terminate supply contracts for many reasons, the results here show us that only a handful of customers found reason to stay with Respondent. Moreover, the numbers USESC cites have not caused the company to alter its unequivocal stance that it offers price stability, not savings.

In sum, the Commission finds eight violations of the CFA, arising from misrepresentations that harmed Ms. Vargas, Mr. Zermeno and the customers referenced in USESC Ex's. 5.3 and 5.4, as described above.

---

[73] Another Regional Distributor, Mr. Nicholson, echoes Mr. Hames: "One of the key items I explain to them is not to promise savings. We have an excellent product that offers a fixed rate for natural gas, but nobody has a crystal ball—the price could be higher or lower than the utility. Because we cannot guaranty savings, I stress to the contractors that they are not supposed to promise savings." USESC Ex. 3.0 at 3.

5. VIOLATION OF THE DTPA

In Count VI of the Amended Complaint, Consumer Groups charge that Respondent violated Section 2 of the DTPA, by "engaging in conduct that creates a likelihood of confusion or misunderstanding for customers."[74] Staff generally supports the Consumer Groups' position and asserts that USESC has committed the purported CFA violations. USESC denies this allegation and has opposed it throughout the case.

Under the provisions of DTPA Section 2 that CUB relies upon (CG IB at 53-54), "[a] person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:

> 1.) passes off goods or services as those of another;
>
> 2.) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> 3.) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;
>
> 5.) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;
>
> 12.) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding[75].

Before summarizing the parties' presentations, the Commission notes preliminarily that ostensible violations of the DTPA are also subject to private enforcement actions under Section 2 of the CFA.

a.) Parties' Evidence & Arguments

Consumer Groups contend that Respondent's sales contractors sowed confusion among consumers by falsely purporting to be from a utility, the Commission or a consumer advocate, including CUB. CG IB at 55. They similarly place emphasis on customers' apparent confusion respecting the competing gas prices offered by USESC and the incumbent utilities. *Id*. Complainants argue that Respondent's ostensibly high customer cancellation rate demonstrates that "customers simply do not understand or are not aware of the difference between USESC's contract price and the utility price, a

[74] Complaint at 10, para. 31.
[75] 815 ILCS 510/2(a).

confusion that is deliberately emphasized by USESC sales agents." *Id*. (citing CG Ex. 1.0 at 30). As a result of "USESC's sales practices creat[ing] a likelihood of confusion of USESC's product and corporate affiliation…[t]he Commission should therefore find violations of the DTPA for the 1,730 valid instances of misrepresentations during 2007 and 2008." *Id*.

Regarding the necessary elements for a claim under the DTPA, Complainants aver that "a plaintiff need not prove actual confusion or misunderstanding," and that no proof of monetary damages, loss of profit, or intent to deceive is required for injunctive relief. *Id*. at 54.

USESC responds that Consumer Groups "must prove the same elements that apply to the CFA," including an intention on the company's part that customers rely on its deception. USESC IB at 71-72, citing People ex rel. Hartigan v. Knecht Services, Inc., 216 Ill. App. 3d 843, 575 N.E.2d 1378 (2nd Dist. 1991). The company maintains that such intention is refuted by record evidence that deceptive representations about pricing or contractor affiliation are contrary to Respondent's policies, directives and the corrective actions purportedly taken against sales misconduct. *Id*. at 72.

Respondent acknowledges that Section 3 of the DTPA[76] authorizes actions for injunctive relief, as opposed to damages, without a showing of intent, but stresses that "Complainants would have to… show that the particular aggrieved customers are 'likely to be damaged in the future' by the alleged deceptive acts. USESC RB at 46, quoting Popp v. Cash Station, Inc., 244 Ill. App. 3d 87, 99, 613 N.E.2d 1150, 1157 (1st Dist. 1992). The company asserts that CUB witnesses Vargas and Zermeno cannot sustain future damage because their contracts with USESC have been nullified. *Id*. at 46-47. Moreover, USESC maintains, Complainants have failed to show that a "wide variety of measures" taken by the Company, along with the consumer protection provisions added to the AGSL in 2009, "are inadequate to prevent any potential confusion in the future." *Id*. at 47.

USESC additionally asserts that *pricing* confusion among customers "is not the kind of confusion that the DTPA addresses." USESC RB at 47. Under the DTPA, " 'likelihood of confusion has the same meaning…as it has in trademark infringement cases,'" where "'the defendant's use of a deceptive trade name, trademark, or other distinctive symbol is likely to confuse or mislead consumers as to the source or origin of the product or service.'" *Id*., quoting Hooker v. Columbia Pictures Indus., Inc., 551 F. Supp. 1060, 1064 (N.D. Ill. 1982).

USESC also reiterates its contention, rejected previously in this Order, that any fault of its sales agents cannot be attributed to Respondent for the purpose of establishing a violation of law. US RB at 72.

b.) Commission Analysis

[76] 815 ILCS 510/3 ("A person *likely to be* damaged by a deceptive trade practice of another may be granted injunctive relief…") (emphasis added).

Like the CFA, the DTPA is one of the "other applicable laws" Respondent must obey in order to comply with subsections 19-110(e)(5) and 19-115(b)(2). Since no other provisions of the AGSL are pertinent to Consumer Groups DTPA claim, the necessary elements of a DTPA violation are solely determined by the text of the DTPA and applicable judicial precedent. Thus, for the reasons the Commission articulated in our analysis of the CFA issues in this proceeding (above), complaints to USESC or to third parties are not enough to establish a DTPA violation (although, as we held earlier, they are sufficient to demonstrate management inadequacy within the meaning of the AGSL). Instead, Consumer Groups must prove up the substantive elements of a DTPA infringement, to show that a violation actually occurred.

Additionally, for the same reasons set forth above with respect to the CFA, the Commission does not conclude that USESC can avoid sharing fault with its sales agents for any violations of the DTPA. Rather than repeat our earlier analysis, we adopt it in full with regard to DTPA. Insofar as its sales agents have contravened the DTPA while purveying gas contracts on the company's behalf, so, too, has Respondent contravened that law.

Depending on the remedy sought, claimants in the courts have asserted violations of the DTPA in either, or both, of two ways. First, complaints for violation of DTPA Section 2 have been lodged under Section 3 of that Act, which permits only injunctive relief against likely future damages[77]. Second, claimants have pursued DTPA Section 2 infringements via Section 2 of the CFA, which expressly incorporates that DTPA section. Claimants who sue under Section 10a of the CFA to redress violations of CFA Section 2 are permitted to seek damages[78]. Additionally, a party can *both* seek an injunction against likely future damage (through DTPA Section 3) and a recovery of already extant damage (through CFA Section 10a CFA, enforcing Section 2 of that act).

> The Deceptive Trade Practices Act provides only for injunctive relief…But [Section 2] of the Consumer Fraud Act incorporates [Section 2] from the Deceptive Trade Practices Act, and [Section 10a] of the Consumer Fraud Act provides damages for a violation of [Section 2]. Thus through use of both statutes a plaintiff may obtain both injunctive relief and damages for conduct which infringes [Section 2 of the DTPA]. American Wheel & Engineering Co. v. Dana Molded Products, Inc., 132 Ill.App.3d 205, 211, 476 N.E.2d 1291, 1295, 87 Ill.Dec. 299, 303 (1st Dist. 1985).[79]

---

[77] *E.g.*, Kensington Wine Auctioneers v. John Hart Fine Wine, 392 Ill. App. 3d 1, 909 N.E. 2d 848 (2009).
[78] *E.g*., Duncavage v. Allen, 147 Ill. App. 3d 88, 102, 497 N.E. 2d 433, 441 (1st Dist. 1986) ("The context and apparent intention of the incorporation [of DPTA Section 2 into CFA Section 2] compels the conclusion that the legislative gave to consumers a vehicle by which they could recover money damages for violations of the [DTPA]."
[79] Unique Concepts, Inc. v. Manuel, 669 F. Supp. 185, 190 (N.D. Ill. 1987), *aff'd* 937 F. 2d 622 (7th Cir. 1991).

Since Consumer Groups are not seeking either an injunction or damages, but only to establish violation of the DTPA, we must identify the substantive elements necessary to that purpose. In all cases (whether under the DTPA standing alone or as incorporated into the CFA), a complainant must demonstrate the *likelihood* of confusion[80] or misunderstanding within the meaning of subsections 2(a)(2), 2(a)(3) or 2(a)(12) of the DTPA[81]. Also, subsection 2(b) of the DTPA states that a complainant need not prove "actual confusion or misunderstanding," and that provision applies in an analysis under the DTPA or the CFA, because it was incorporated into the latter. Thus, the principal differences when considering the DTPA as incorporated into the CFA (rather than the DTPA standing alone) are, first, that there is a violation irrespective of whether "any person has in fact been…damaged" by the unlawful act or practice, and, second, that intent to deceive is part of the violation[82].

Looking first at Consumer Groups claim under DTPA Section 2 standing alone, the Commission finds deceptive acts within the meaning of that section in certain instances. To the extent that the record shows that USESC's sales agents have passed themselves off as representatives of an entity other than the company (whether a gas utility, a government agency, a consumer advocate or some other) they (and the principal whose contracts they purveyed) caused the likelihood of confusion or misunderstanding among consumers. Such confusion is directly proscribed by subsections 2(a)(2) (confusion regarding the "source, sponsorship, approval, or certification of goods or services"), 2(a)(3) (confusion regarding "affiliation, connection, or association with or certification by another") and 2(a)(5) (representations regarding "sponsorship, approval, status, affiliation, or connection that [the defending party] does not have"). Causing such confusion would also affront subsection 2(a)(12) ("engages in any other [i.e. not already enumerated] conduct which similarly creates a likelihood of confusion or misunderstanding"), which the Illinois courts accord broad meaning[83].

There are three affiliation-confusion violations of the DTPA established by the record. First, CUB witness Zermeno states that Respondent's sales agent purported to represent the utility supplying his natural gas[84]. CUB Ex. 4.0 at 1-2. Although neither element is necessary under the DTPA standing alone, the Commission finds (as we did in our CFA analysis above) that the sales agent intended that Mr. Zermeno rely on his

[80] The likelihood-of-confusion standard "`requires only that a seller identify his product or service in such a manner that 'purchasers exercising ordinary care to discover whose products [or services] they are buying will know the truth and not become confused or mistaken.'" Phillips v. Cox, 261 Ill. App. 3d 78, 83, 632 N.E. 2d 668, 671 (1st Dist. 1994) (brackets in original].

[81] DTPA subsection 2(a)(5) does not mention confusion.

[82] It therefore follows that Respondent is not always correct in its blanket assertion that Complainants "must prove the same elements that apply to the CFA," including an intent to induce reliance. Such intent does not appear in DTPA Section 2 standing alone.

[83] "[W]e want to make it clear that we are basing this decision on the broad language of subsection 12 of Section 2 of the [DTPA]. We start from the premise advanced in Unique Concepts v. Manual [citation omitted] that 'any conduct in a business which creates a likelihood of consumer confusion or misunderstanding is potentially actionable.'" Phillips v. Cox, 261 Ill. App. 3d at 81, 632 N.E. 2d at 670.

[84] The Commission has already rebuffed the company's challenge to Mr. Zermeno's reliability and integrity, during our assessment of Complainants' CFA claims. We do so again, for the same reasons, regarding their DTPA claims.

deception in order to make a sale and that Mr. Zermeno was actually confused about the agent's affiliation. This finding is in no way mitigated by the customer service representative's statement during Mr. Zermeno's sales verification call, in English, that "USESC is not affiliated with Peoples." USESC Cross-Ex's 1 and 1A. That came after an extended series of details about terms and conditions and was followed immediately by two more references to Peoples Gas. *Id*. The Commission does not doubt Mr. Zermeno's assertion that he did not understand the details of the verification call. CUB Ex. 7.0 at 3.

Similarly, USESC Ex. 5.4 shows that the company issued a penalty letter dated October 27, 2007 to contractor "JS," who, in September 2007, "misled [the customer] to believe that he was from Nicor who was offering her a deal." USESC confirmed this deception by penalizing the sales agent. Respondent confirmed *another* identity misrepresentation by contractor "JS" in letters included in USESC Ex. 5.3. Although not necessary under the DTPA standing alone, the most reasonable inference is that salesperson "JS" intended for the customers to rely on his deceptions.

Also in USESC Ex. 5.3, the company confirmed one misrepresentation regarding prices by sales agent "NA" and two misrepresentations ("savings" and "Nature/Purpose") by sales agent "PE." In USESC Ex. 5.4, Respondent confirmed *yet another* misrepresentation ("Customer complained that independent contractor misrepresented the whole program") by sales agent "PE." The Commission finds that these misrepresentations affront DTPA subsection 2(a)(5) because they concern "characteristics" and "benefits" not included in Respondent's gas service. They also contravene subsection 2(a)(12) by "similarly creat[ing] the likelihood confusion and misunderstanding." We reject USESC's argument that only confusion about trademarks and the like are contemplated by the DTPA[85]. USESC RB at 47, citing Hooker v. Columbia Pictures, 551 F. Supp. 1060 (N.D. Ill. 1982). Complaints under the DTPA have concerned a broad range of confusion-causing activities other than trademark infringements, as the cases cited in the instant section of this Order demonstrate[86].

In total, we find seven violations of the DTPA standing alone (three identity misrepresentations and four pricing, savings or product misrepresentations).

Considering the DTPA as incorporated into the CFA, the Commission holds that each of the instances of misrepresentation addressed above constitutes a violation of the incorporated DTPA, just as they violated the DTPA standing alone. Again, the additional element of a CFA-based DTPA violation is the intent to induce reliance. In each case, the most reasonable inference from the circumstances presented is that the sales agent intended that the customer believe the misrepresentation and execute a gas supply contract.

[85] We cannot discern whether this argument is intended to apply to DTPA subsection 2(a)(5), which does not mention confusion.

[86] And there are many others. *E.g.*, Hartigan v. Maclean Hunter Publishing, 119 Ill. App. 3d 1049, 457 N.E. 2d 480 (1983).

Therefore, we find seven violations of the DTPA as it is incorporated into the CFA (three identity misrepresentations and four pricing, savings or product misrepresentations). For remedy purposes, the Commission will not double-count the violations of the DTPA standing alone and the incorporated DTPA. Our intention here is only to determine the number of violations (if any) that emerge depending upon how the DTPA is applied.

6. VIOLATION OF THE PROHIBITION AGAINST UNREASONABLE LIQUIDATED DAMAGES

USESC imposes a termination fee on customers who prematurely end their gas supply contracts. Before February 2008, USESC calculated exit fees using a forecast rate of consumption for the remainder of the contract term multiplied by a fixed rate per therm.[87] In Count VII of the Amended Complaint, Consumer Groups assert that the termination fees resulting from that methodology "constitute[] an illegal penalty for cancellation of service under Illinois law."[88] USESC denies this allegation and has opposed it throughout the case.

a.) Parties' Evidence & Arguments

As an example of Respondent's unlawful termination fees, Complainants present the following provision in a version of USESC's residential customer contract (denominated a "Program Agreement"):

> Customer agrees to pay those damages as liquidated damages calculated as follows: 10 cents/therm times the remaining years, or part thereof, of the Term times Customer's annual gas usage in therms. For an average

---

[87] Beginning February 4, 2008, after discussions with Staff, the company began selling residential contracts with a termination fee of $75 per unfulfilled contract year. USESC Ex. 1.0 at 14; USESC IB at 76. In the AG-USESC Consent Decree, approved on May 14, 2009, USESC agreed to apply a $50 total (*i.e*., not annual) termination fee to residential and small commercial contracts entered into on or after January 1, 2009, USESC Ex. 5.14. The 2009 amendments to the AGSL applied the $50 cap to all AGS contracts signed on or after April 10, 2009. 220 ILCS 5/19-115(g)(5)(A). Also as part of the settlement with the AG, USESC customers signing contracts from January 2007 through December 2008 (with certain exceptions), along with other specified customers, were permitted to cancel their contracts without penalty. Additionally, the 2006 CUB-USESC settlement allowed customers signing contracts before 2007 to avoid cancellation penalties. As a result, the customers subject to the cents-per-therm penalty are those who did not use, or qualify for, the remedies in the previous settlements. CG RB at 58.

[88] Complaint at 10, para. 33. Complainants do not object to the $50 termination fee described in the preceding footnote (which was not applicable during the relevant time frame here). They do criticize the $75 annual termination fee described in that footnote (which was applied during the last two months of the relevant time frame). CG RB at 24. However, even when construed broadly, Count VII of the Complaint cannot be fairly read to allege that the $75 fee is an unreasonable penalty. The Commission finds that Count VII concerns only the cents per therm provision.

residential customer, the liquidated damages would be $100 for each remaining year of Term[89].

Consumer Groups maintain that in Illinois "a liquidated damages clause is valid and enforceable when: 1) the actual damages from a breach are difficult to measure at the time the contract was made; and 2) the specified amount of damages is reasonable in light of the anticipated or actual loss caused by the breach." CG IB at 56, citing Lake River Corp. v. Carborundum Co., 769 F.2d 1284 (7th Cir. 1985). When the specified liquidated damages unreasonably exceed anticipated or actual loss, they become an unlawful penalty. A penalty "is unenforceable on grounds of public policy," and "close cases will be resolved in favor of finding the disputed clause a penalty." *Id*. Consequently, "[i]f the purpose of the clause fixing damages is merely to secure performance of the agreement, it will be not be upheld." *Id*. at 56-57, citing Stride v. 120 West Madison Building Corp., 132 Ill. App. 3d 601, 477 N.E. 2d 318 (1st Dist. 1985).

Complainants argue that the liquidated damage formula quoted above yields termination fees that "are not a reasonable estimate of the damages that would actually result from a breach of the contract and therefore constitute an impermissible means to punish nonperformance."[90] This is so, they contend, because "the termination fee includes the Company's lost profits, and is not reflective of its actual costs," and does not take into account Respondent's ability to mitigate loss by selling gas to other customers or into the wholesale market. CG IB at 57.

Consume Groups estimate that a $662.50 termination fee would be applied to a customer that terminated the contract within the first year of a five-year contract (based on what CUB views as the average annual residential usage of 1,325 therms). *Id*. at 57. They assert that the real purposes of such fees are to discourage contract cancellation and extract profit from contract termination. CG RB at 24-25.

USESC replies that its termination fee satisfies the criteria for a permissible liquidated damage provision and is not an unenforceable penalty. According to the company, the applicable test is whether: "`1) the parties intended to agree in advance to the settlement of damages that might arise from the breach; 2) the amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained; and 3) actual damages would be uncertain in amount and difficult to prove.'" USESC IB at 74, quoting Jameson Realty Group v. Kostiner, 351 Ill. App. 3d 416, 423, 813 N.E.2d 1124, 1130 (1st Dist. 2004). Respondent avers - and the Commission agrees - that the parties' dispute is essentially confined to the second element (the reasonableness of the liquidated damage amount)[91].

[89] Complaint, Attach. K, p. 3, para. 11. The per-therm penalty for small commercial customers is 13 cents. USESC Ex. 1.0 at 13.
[90] Complaint at 11, para. 33.
[91] That does not mean, however, that the parties agree on how to determine reasonableness. We discuss this later.

The company insists that reasonableness is appropriately determined by reference to the non-defaulting party's anticipated profit, rather than to any diminished value in the commodity sold under the contract (here, natural gas) or other out-of-pocket loss. USESC states that the "proper measure of damages in a common law breach of contract case is one which places the party entitled to damages in the same position at the time of judgment as he would have been in had the breach not occurred." USESC IB at 75 (quoting Mercantile Holdings, Inc. v. Keeshin, 261 Ill. App. 3d 546, 550, 633 N.E.2d 805, 808 (1st Dist. 1993)). "In order to be placed into the position it would have been but for the early termination, [USESC] must receive its expected profit margin." *Id*.

In USESC's view, Consumer Groups simply oppose recovery of lost profits as a matter of public policy, *id*. at 78, even though the actual public policy reflected in Illinois judicial opinions is to allow such recovery. *Id*., citing Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill. 2d 218, 856 N.E.2d 389, (2006). The company adds that the courts have allowed liquidated damages "even when a party incurs no out-of-pocket losses or expenses." *Id*., citing Curtin v. Ogborn, 75 Ill. App. 3d 549, 553, 394 N.E.2d 593, 598 (1st Dist. 1979).

Respondent notes that an example of the magnitude of its lost profits appears in USESC Cross-Ex. 5 (confidential) and opines that Consumer Groups have neither refuted the numbers in that exhibit nor proven that the calculated profit margin is unreasonable when compared to the relevant 10 cents/therm liquidated damage. USESC RB at 51. The company believes that the burden of proving that the contractual termination fee is unrelated to actual damages (including lost profits) lies with Consumer Groups. *Id*. at 48-49.

b.) Commission Analysis

The Commission does not view this proceeding as an appropriate vehicle for rendering a comprehensive decision on the nature and scope of termination provisions in customer contracts. The money-per-therm termination fee mechanism at issue here has not appeared in USESC contracts in almost two years. It has been unlawful under the AGSL for new contracts since April 2009. Nonetheless, we would certainly consider precisely delineating the legal and operational parameters of money-per-therm termination fees if the relationship between Respondent and customers with long-term contracts needed clarification. But that does not appear to be the case. Under the combined effect of the company's 2006 settlement with CUB and its 2009 AG-USESC Consent Decree, virtually every remaining USESC customer has had the opportunity to terminate without penalty. Consumer Groups do assert that "[i]t is conceivable that a customer was not eligible or did not receive the claim form in either case." CG IB at 58. While that statement is sufficiently subjunctive to be inarguable, it nonetheless seems that events since March 2008 (when the original complaint was filed) have transformed Count VII into a solution in search of a problem. Accordingly, the Commission is inclined to say no more than what is minimally necessary to resolve the instant complaint.

Is the money-per-therm provision here a permissible liquidated damages mechanism or an unenforceable penalty? For our purposes, the elements of a permissible mechanism are generally clear - difficulty in ascertaining actual damages and a reasonable relationship between the liquidated damage and likely actual damage. In essence, actual damages must be uncertain enough to justify establishing a proxy, but not so uncertain that reasonableness is indeterminable.

Are the actual damages arising from customer breach of an AGS supply agreement uncertain enough to warrant replacing proof with an agreed proxy? The General Assembly has essentially answered that question in the AGSL revisions. In subsection 19-115(g)(5)(A), it authorizes "early termination clauses" that do not exceed $50. It also directs the Commission, in subsection 19-125(c)(3)[92], to adopt a uniform AGS disclosure for "the amount of termination fees, if any." Therefore, in our view, it is the policy of this state that actual damages for breach of an AGS supply contract are sufficiently uncertain to justify, in lieu of proof, the use of an agreed proxy.

The record here is consistent with that view. While the company has precisely calculated the cost for providing service under its contracts, USESC Cross-Ex. 5, the lion's share is associated with the price of the gas commodity. Since Respondent purchases that supply in 5-year increments and sells contracts based on the price paid, Tr. 717 (Potter), it also knows the supply price over the life of a contract. What it does not know, however, is the price at which it can sell that gas (to another supplier or another customer) in the event of future breach by the customer. Depending on the market, Respondent could experience a range of outcomes, from substantial loss on the supply purchase price to substantial gain (relative to the supply price embedded in the breached contract).

Are the cents-per-therm fees here reasonably related to USESC's likely actual loss? Respondent is correct that lost profits can be properly included in the calculation of reasonableness. <u>Tri-G, Inc. v. Burke, Bosselman & Weaver</u>, *supra*. When those profits are added to the other business costs that cannot be avoided in the event of breach, USESC Cross-Ex. 5, and when that sum is compared to Respondent's termination fees, which are considerably smaller, the Commission cannot find the latter unreasonable. This does not mean, of course, that either the cost elements or the profit margin in USESC Cross-Ex. 5 (or the gross profit margin described at Tr. 715 (Potter)) are themselves reasonable. We have no way to determine that on the present record, which has no usable factual or legal analysis for that purpose, and we do not regulate AGS' cost of service. Moreover, the reasonableness - indeed the legality - of AGS termination fees has been legislatively capped at $50 on new contracts since April 2009, so our determination here has no bearing on any supply contracts subject to the current AGSL. Nor does it have any bearing on the contracts subject to Respondent's voluntary settlement agreements or the AG-USESC Consent Decree.

[92] 220 ILCS 5/19-125(c)(3).

Accordingly, the Commission concludes that Complainants have not met the burden of proving that the specific cents-per-therm termination charges presented for consideration in the instant case are unenforceable penalties.

7. VIOLATION OF GAS UTILITY TARIFFS

USESC, like other AGS, relies on the incumbent gas utilities to transport gas to the company's customers. Peoples Gas provides transportation service under a tariff rider known as "Choices for You" ("CFY"). Nicor's equivalent tariff rider is called "Customer Select." In Count VIII of the Amended Complaint, Consumer Groups allege that USESC has contravened the Standards of Conduct in each of those gas transport tariffs.

Complainants cite (but do not limit their allegations to) the requirement in each relevant tariff to "adhere to any applicable truth in advertising laws."[93] If Complainants' charges are correct, Respondent is subject to complaint under subsection 19-120(b)(3) (because it "has violated or is in nonconformance with the transportation services tariff of the gas utility") and eligible for the penalties included in subsection 19-120(c) (set forth in an earlier section of this Order). In addition, the tariffs state that a nonconforming AGS is subject to removal from the utility's gas transportation program. USESC denies these allegations and has opposed them throughout the case.

a.) Parties' Evidence & Arguments

Consumer Groups cite the CFA as an example of a truth in advertising law that USESC must conform to under the utilities' gas tariffs. CG IB at 58. They marshal the same arguments here that they presented in connection with their CFA allegations, discussed earlier. Complainants also charge that USESC has failed to "'establish customer complaint procedures and respond to complaints promptly,'" as required by the Standards of Conduct.[94] *Id*. at 59. They aver that "USESC itself admits to a case-by-case, disaggregated, 'multi-departmental' approach to responding to consumer complaints." *Id*.

The company rejoins that there is no Illinois truth in advertising law *per se*, that the DTPA is the state statute potentially applicable to that subject, and that Count VIII of the Complaint is therefore duplicative of Count VI, above. USESC IB at 79. Because Consumer Groups cite the CFA as a truth in advertising law, USESC similarly argues that Count VIII is duplicative of Count V. USESC RB at 52-53. Respondent further asserts that the only potentially applicable federal truth in advertising law is the Federal

[93] Complaint at 11, para. 35. The pertinent tariff pages are attached to the Complaint as Ex. L (Peoples Rider AGG, Aggregation Service, Ill. C.C. No. 28, 1st Rev. Sheet No. 116. Sec. J(j); Nicor Rider 16, Supplier Aggregation Service, Ill. C.C. No. 16, 2nd Rev. Sheet No. 75.9 *et. seq*., Standards of Conduct, Sec. (k)).
[94] The applicable provisions appear as subsection (g) in each Standard of Conduct cited above.

Trade Commission Act ("FTCA")[95], and that enforcement of the FTCA is reserved to the FTC. USESC IB at 80.

Additionally, Respondent maintains that Complainants' factual allegations are unrelated to advertising. "Neither alleged misstatements in direct sales to customers, nor alleged false statements in the contract or brochures handed to the customer at the point of sale come within the purview of "'false advertising.'" *Id*. at 80, citing First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800, 803 (7th Cir. 2001). Moreover, the company insists, "wide dissemination" of advertisements is an essential element in a false advertising claim under the FTCA. *Id*. at 80-81, citing several federal cases. "There is no evidence of wide dissemination or any dissemination through mass media in this case." *Id*. at 81.

As for Complainants' contention regarding the adequacy of the company's complaint procedures, Respondent states that "[t]his argument clearly exceeds the scope of the Complaint and should be rejected for that reason alone." USESC RB at 53. Even if Complainant's argument is cognizable here, the company declares that it is defeated by Consumer Groups' own acknowledgements and Respondent's evidence. *Id*. at 53-54.

b.) Commission Analysis

The initial task is to determine what constitutes a truth in advertising law within the meaning of the relevant utility transportation tariffs. The Commission agrees with Respondent that the oral sales pitches presented to consumers by company contractors are not advertising in this context. It is dispositive that Nicor's transportation tariff also addresses "marketing" and "solicitation,"[96] while the Peoples Gas tariff addresses "marketing."[97] No operative term in a tariff, which has the force of law, should be considered superfluous, so "marketing," "solicitation" and "advertising" must each have an independent meaning. Without intending to articulate precisely what these words mean in all cases, we do hold that the in-person, oral sales pitches described in the present record are not advertising. In common parlance (and Consumer Groups have given no reason to depart from common parlance), advertising is a general communication to anyone that might encounter it, not a face-to-face sales attempt. First Health Group Corp., *supra*. Putting that another way, the salesperson's approach to the in-store customer is not advertising, but the store's leaflet in the customer's hand is.

The Commission also finds that Consumer Groups have not proved that USESC has failed to establish complaint procedures or respond promptly to complaints received. The company obviously fields complaints - indeed, Consumer Groups use those complaints, and Respondent's handling of them, to support their other allegations in this case. The promptness of USESC's responses to customers has simply not been explored through evidence. Therefore, we have no basis for characterizing the

[95] 15 USC sec. 52(a).
[96] Subsections (i), (j) and (m), in the Nicor Standards of Conduct cited above.
[97] Subsections (i) in the Peoples Gas Standards of Conduct cited above.

company's responses as either prompt or not prompt. Since Complainants carry the burden of proof, they cannot prevail on this issue.

The Commission notes our earlier conclusion that Respondent committed a single violation of AGSL subsection 19-115(f) in USESC Ex. 1.6, by distorting the price disclosure required by that subsection. Subsection (m) of Nicor's Standards of Conduct essentially tracks the language of subsection 19-115(f). While Consumer Groups did not specifically cite subsection (m) in Count VIII of the Complaint, they expressly stated that their Standards of Conduct allegations were not limited to the truth in advertising provisions in the utility's tariffs[98]. Moreover, Respondent had the opportunity to, and did, vigorously defend its written price disclosures in the context of Count IV. Since AGSL subsection 19-115(f) and subsection (m) of Nicor's Standards of Conduct are virtually identical, USESC has therefore committed a single violation of the latter.

8. SUMMARY OF COMMISSION CONCLUSIONS

The Commission renders the following findings and conclusions with respect to the substantive counts in the instant Complaint.

Count IV

USESC's management was insufficient within the meaning of subsections 19-110(e) and 19-115(b) of the AGSL from January 2007 through March 2008.

USESC committed eight violations of subsection 19-115(c) by failing to obtain verifiable authorization before switching a customer's gas supplier.

USESC committed a single violation of subsection 19-115(f) by disseminating marketing material that distorts the required disclosure of the price of its services.

Count V

USESC committed eight violations of the AGSL, in the form of CFA violations, through deceptive acts and misrepresentations, which the company intended customers to rely upon, while engaged in trade and commerce.

Count VI

USESC committed seven violations of the DTPA, in the form of CFA violations, through misrepresentations concerning identity, pricing, savings or products that caused the likelihood of confusion or misunderstanding for customers

Count VII

[98] Complaint at 11, para. 35.

USESC has not violated the common law prohibition against unreasonable liquidated damages.

Count VIII

USESC has committed a single violation of subsection (m) of Nicor's Standards of Conduct tariff.

III. REMEDIES

A. AUTHORIZED REMEDIES

With regard to AGS, subsection 19-120(c) authorizes the Commission to:

> 1.) order an [AGS] to cease and desist, or correct, any violation of or nonconformance with the provisions of Section 19-110 or 19-115;
>
> 2.) impose financial penalties for violation of or nonconformance with the provisions of Section 19-110 or 19-115, not to exceed (i) $10,000 per occurrence or (ii) $30,000 per day for those violations or nonconformances which continue after the Commission issues a cease-and-desist order; and
>
> 3.) alter, modify, revoke or suspend the certificate of service authority of an [AGS] for substantial or repeated violations of nonconformances with the provisions of Section 19-110 or 19-115

B. THE PARTIES' REQUESTED REMEDIES

Complainants' primary request is that the Commission revoke USESC's certificate of service authority and order USESC to cease its Illinois operations. Their secondary request is a cease and desist order (or modification of Respondent's certificate) preventing USESC from marketing door-to-door, plus an independent audit of USESC's management oversight of its sales practices, performed at the company's expense. Consumer Groups request the audit even if we decline to issue a cease and desist order. As a fourth potential remedy, Complaintants recommend a series of specific corrective measures for the company's operations. In all events, Complainants request financial penalties. CG RB at 32-35.

Staff also requests financial penalties and presents its own detailed list of corrective actions for Respondent's sales program. Staff RB at 42-43 Staff does not take an explicit position regarding the more severe remedies requested by Complainants.

Respondent opposes any penalties and requests an order rejecting the Complaint in its entirety. The company's view is that no violation of law has been proven and, in any case, its own voluntary efforts and the restrictions included in the AG-USESC Consent Decree and the revised AGSL will suffice to control all but random misconduct. USESC RB at 54-64.

C. COMMISSION CONCLUSIONS

1) Financial Penalties

Staff spots the question that arises from the conclusion that USESC has violated the management sufficiency requirement in the AGSL: does that constitute one, or more than one, violation (or "occurrence" within the meaning of subsection 19-120(c)(2))? Staff IB at 24. This question is begged because the substantive violation here is the failure to maintain sufficient "managerial resources and abilities," as demonstrated by massive numbers of complaints of similar kind, and by proven violations of other AGSL provisions, the CFA and the DTPA. When did USESC management cease being sufficient? For that matter, was it already insufficient when the relevant time frame began in January 2007? Putting it another way, when did management lose adequate control of the sales force? Additionally, once that control was lost, was the failure to regain it more than one violation of the sufficiency requirement?

The Commission believes that USESC had notice of the likelihood of additional misrepresentation complaints in January 2007. It had settled CUB's previous complaint, based on allegations similar to those here, in October 2006. It had received deception and misrepresentation complaints and a negative rating from the BBB well before January 2007, along with similar complaints forwarded by CUB. It was familiar with the flow of complaints lodged directly with the company. In March 2007, misrepresentation-related complaints spiked upward. CG Ex. 3.3. They then decreased as the heating season waned (but to a level far in excess of the levels in the next year), then skyrocketed when the heating season peaked again. *Id*. The Commission cannot pinpoint an exact day on which management became insufficient, and we need not do so[99]. We believe that the conditions that abetted the March 2007 complaint spike were in place by January 2007. Accordingly, we find management insufficiency persisted throughout the relevant time frame.

The Commission does not construe 15 months of management to constitute a single violation within the meaning of subsection 19-120(c)(2). That would create an incentive to perpetuate failure, since a persistent management failure would receive no

[99] There may be circumstances in other cases where a precise managerial failure stands out – say, a ruinous investment decision. This is not such a case. In this instance, management insufficiency may have begun with bad hiring and training of contractors, with inadequate misconduct penalties or lax enforcement of them, with haphazard complaint tracking, with a corporate culture that denied the implications of voluminous complaints, or with any of the root causes discussed in this Order. While these factors may have been in play well before 2007, USESC was not obliged, in this proceeding, to defend its management performance in any month prior to January 2007.

more penalty than a brief one, thereby rendering the remedial statute ineffective. On the other hand, it would not be reasonable to impose penalties for increments of time that are disproportionate to the problem. Management sufficiency of the kind here cannot be restored overnight. Therefore, we conclude that every additional month of management inadequacy is another violation within the meaning of the AGSL.

In this proceeding, complaints reached their pinnacle in the last three months of the relevant time frame, so the Commission finds that there was no improvement during the 15 months. Thus, we find 15 occurrences suitable for penalty. Because of the importance, magnitude and duration of the management deficiency, which affected many individual customers and sowed confusion in the competitive retail gas market, we impose the $10,000 maximum penalty for each occurrence, totaling $150,000.

Concerning the eight violations of subsection 19-115(c) found above, the Commission will impose the penalty of $1000 for each of six of those infractions. For the second violation by contractor "BC," we levy a penalty of $2000 because it is a repeat offense. The Commission also imposes a $2000 penalty for the Vargas incident, which was egregious and involved failure by the sales verifier as well as the sales agent. The total for subsection 19-115(c) violations is $10,000.

For the single violation of subsection 19-115(f), the Commission imposes a penalty of $7500. The pertinent letter was intended for distribution to every newly signed costumer, so its impact on customer decision-making during the cancellation period was potentially widespread.

The Commission penalizes four of the eight AGSL/CFA violations in the amount of $1000 each. Two others - the repeat offenses of contractors "JS" & and "PE" - are penalized $2000 each. The third violation by contractor "PE" is penalized $3000. Section 4-205 of the Act[100] provides that "[a]ll penalties accruing under this Act shall be cumulative of each other." Nevertheless, we will not cumulatively penalize the Vargas incident[101]. The total for CFA violations is $11,000.

Similarly, the Commission will not impose cumulative penalties for the seven violations of the AGSL/DTPA, which arise from the same incidents as the AGSL/CFA violations in this proceeding[102].

We will also not impose a cumulative penalty for the single violation of Nicor's Standards of Conduct tariff, which arises from the same price disclosure that violated subsection 19-115(f) of the AGSL[103].

[100] 220 ILCS 5/4-205.
[101] But if the subsection 19-115(c) violation associated with the Vargas incident is overturned on appeal, the CFA violation is penalized $2000.
[102] But if any AGSL/CFA violation is overturned on appeal, the corresponding AGSL/DTPA violation for the same incident will be penalized in the amount of the AGSL/CFA violation.
[103] But if the subsection 19-115(f) violation is overturned on appeal, the tariff violation will be penalized in the amount of the AGSL/CFA violation.

The total of imposed penalties is $178,500.

2) Corrective Measures

Since this proceeding began, USESC has become subject to the terms of the AG-USESC Consent Decree entered in May 2009. Additionally, since April 2009, all AGS are now governed by the revised terms of the AGSL. Respondent asserts that it is presently in compliance with those requirements, and that no additional measures are needed to ensure its future adherence to those or any other legal and regulatory obligations it has.

The Commission cannot confirm those assertions on the present record, which focused on the relevant time frame ending in the first quarter of 2008, and in which the most recent testimony was filed in January 2009. We have determined that Respondent's management resources and abilities were deficient from January 2007 through March 2008. That was the subject of the instant complaint. The record contains contradictory evidence pertaining to the remainder of 2008[104] and virtually no evidence about 2009 or today. There is nothing, other than Respondent's self-assessment, to demonstrate the company's adherence to the AG-USESC Consent Decree provisions or the revised law.

Insofar as the company contends that the very existence of the AG-USESC Consent Decree and revised statute is proof that USESC will comply with their terms, the Commission observes that the company did not meet the standards in the AGSL (and presumably in the earlier settlement with CUB - we do not know its terms, but CUB is a complainant here) during the relevant time frame. Moreover, the Commission is authorized to establish requirements in addition to the specifics of the AGSL, particularly as corrective measures under subsection 19-120(c)(a), to suit a supplier's individual circumstances.

First, the Commission requires USESC to undergo an independent audit of its sales program, with a focus on hiring, training, solicitation procedures and performance, compensation, sales verification, complaint tracking and reporting, discipline, and other compliance practices. The objective is to substantially reduce customer complaints and violations of the AGSL. The audit should identify impediments to that objective and recommend effective solutions. The auditor and audit plan shall be approved by Staff, with input from USESC. The company will be responsible for the cost of the audit. Audit results should be submitted to Staff and USESC by September 1, 2010. Unless USESC voluntarily agrees to implement the audit's recommendations, a docket shall be promptly opened to review the audit's recommendations and USESC's responses and enter an appropriate implementation Order.

[104] For example, USESC's Mr. Potter described meaningful improvement in contractor complaint volume through 2008, USESC Ex. 5.0 at 44-46, while CG witness Ms. Alexander countered that the company's own data shows a significant increase in complaints in the heating season (December 2008). CG Ex. 3.0 at 16.

Irrespective of Respondent's objection to an audit here, the revised AGSL, with which USESC comports to comply, directs the Commission to consider an AGS' "commitment of resources to the management of sales and marketing staff, through affirmative managerial policies, *independent audits*, technology, hands-on field monitoring and training, and, in the case of applicants who will have sales personnel or sales agents within the State of Illinois, the applicant's managerial presence within the State."[105] We therefore reject the claim that an audit is too burdensome.

Second, the Commission requires additions to Respondent's third-party sales verification procedures. Absent the constant presence of a supervisor or the video recording of every sales contact, the verification is the only available real-time confirmation of a lawful sale. Yet there were important flaws in the verification process in place during the relevant time from. For example, the verifier did not confirm the customer's understanding that the contractor was unaffiliated with the local gas utility. Tr. 360 (Findley). The following remedial measures are necessary to the effectiveness of that confirmation.

> Verification calls must be performed without the salesperson being present. Specifically, the salesperson cannot be visible to the customer or able to hear the customer's conversation with the verifier during the call. The salesperson may be present with the customer after the call is completed and the phone connection disengaged.
>
> The verification script should include audible confirmation from the customer that the sales agent is not present before the verification portion of the call begins.
>
> Each verification question should request verification of a single fact and there should be a sufficient pause for an answer to each question before another question is asked.
>
> All substantive revisions to third party verification scripts must be submitted to Staff within 48 hours.

Third, the Commission will mandate the additional requirements below for printed sales and marketing materials. It is vital that those materials are completely accurate and free of distorted information. Indeed, the printed materials may vitiate distortion by a sales contractor.

> In printed materials utilized during in-person sales contacts at or near a residence or business premises, any price comparison between USESC and a gas utility shall be limited to the utility serving the area in which the residence or business is located. All depictions of utility prices shall display at least three years of data in no greater than quarterly increments

[105] 220 ILCS 5/19-110 (e)(1)(C) (emphasis added).

> Any graph-style depiction of prices should not depict any future price of any utility and should not depict or suggest that a utility's future prices will be higher than the last month for which the price is known.

Fourth, no USESC employee or agent with supervisory or disciplinary authority over Illinois distributors, contractors or other sales personnel shall be compensated through commissions associated with the sale of USESC products. An incentive structure for such employees or agents that rewards reduction of complaints and non-compliances is permissible.

Fifth, customer requests for service cancellations must be forwarded to the utility for cancellation within two business days of the Company receiving the request from the customer, and without any barriers beyond normal legal retention efforts. Cancellations should be done at the customer service level, not escalated or referred to some other department, such as CCR, although customer complaints associated with cancellations may be separately escalated or referred.

Sixth, the Commission finds that the provisions in Sections A through G (except subsection G(3)) in the AG-USESC Consent Decree, cited above, are substantively responsive to the management insufficiency and other AGSL violations found in this Order. As a corrective measure under subsection 19-120(e), we will hereby incorporate those provisions here as requirements of the Commission, enforceable by this Commission in the same manner as the other corrective measures required by this Order.

IV. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) USESC is an authorized Alternative Gas Supplier in the State of Illinois within the meaning of Section 19-105 of the Act;

(2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;

(3) the recitals of fact set forth in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as findings of fact;

(4) USESC's management was insufficient within the meaning of subsections 19-110(e) and 19-115(b) of the AGSL from January 2007 through March 2008;

(5) USESC committed eight violations of subsection 19-115(c) by failing to obtain verifiable authorization before switching a customer's gas supplier;

(6) USESC committed a single violation of subsection 19-115(f) by disseminating marketing material that distorts the required disclosure of the price of its services;

(7) USESC committed eight violations of the AGSL, in the form of CFA violations, through deceptive acts and misrepresentations, which the company intended customers to rely upon, while engaged in trade and commerce;

(8)USESC committed seven violations of the DTPA, in the form of CFA violations, through misrepresentations concerning identity, pricing, savings or products that caused the likelihood of confusion or misunderstanding for customers;

(9) USESC has not violated the common law prohibition against unreasonable liquidated damages.

(10) USESC has committed a single violation of subsection (m) of Nicor's Standards of Conduct tariff.

(11) USESC should be penalized under subsection 19-120(c)(2) for the violations described in preceding Findings in the amount of $185,000;

(12) USESC should be required to implement each of the corrective measures set forth in the Remedies section of this Order, above;

(13) Any motions, petitions, objections, and other matters in this proceeding that remain outstanding should be denied.

IT IS THEREFORE ORDERED and declared that USESC is in violation of the Act in the manner described in the Findings above.

IT IS FURTHER ORDERED that USESC shall be penalized in the amount of $185,000;

IT IS FURTHER ORDERED that USESC shall implement each of the corrective measures set forth in the Remedies section of this Order.

IT IS FURTHER ORDERED that any motions, petitions, objections, and other matters in this proceeding that remain outstanding are hereby denied.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Admin. Code § 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:	January 11, 2010
BRIEFS ON EXCEPTIONS DUE:	January 25, 2010

David Gilbert
Administrative Law Judge